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Supreme Court of the United States

OCTOBER TERM, 1951

No. .....

ANHEUSER-BUSCH, INCORPORATED,

Petitioner,

against

DUBOIS BREWING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Statement of the Matter Involved

This case involves the question whether the Court of Appeals so far departed from the accepted and usual course of judicial proceedings in sanctioning the District Court's judgment after mandate as to call for the exercise of this Court's power of supervision. Specifically it involves the Court's fundamental obligation to decide all the material issues of the case and the ultimate question whether the Court was justified in refusing to decide the vital issue of the scope and extent of the estoppel asserted by respondent, which was presented by the pleadings and as to which the facts are of record, hereby denying peti-

tioner relief to which it may have been entitled and remitting petitioner to a multiplicity of suits.

Petitioner, Anheuser-Busch, Incorporated, sued DuBois Brewing Company for trade-mark infringement and unfair competition in the United States District Court for the Western District of Pennsylvania; and the Trial Court held that while laches existed, respondent's fraud excused the laches and granted an absolute injunction against respondent's use of petitioner's trade-marks "Budweiser" and "Bud".[1]

The Court of Appeals for the Third Circuit, with Goodrich, C. J. dissenting, reversed, and in so doing changed the basis of the decision, holding that there was insufficient fraud to excuse laches and that petitioner was estopped from enjoining respondent from using "DuBois Budweiser" in localized territory where it had established a good will. The Court concluded that the parties should be left in the same position as they were on April 20, 1940, but failed to define the status quo or to fix the geographic limits of respondent's "localized" territory.[2] This Court denied certiorari.[3]

Upon remand the District Court (by Fee, J., specially designated, the Trial Judge having died in the meantime) refused to fix the geographic boundaries of the localized territory or to determine the existing issue as to petitioner's right to enjoin the continuance of respondent's use of "DuBois Budweiser" in places where its sales had been

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[1] 73 F. Supp. 338 (W. D. Pa., 1947).

This is a civil case governed as to substantive law by the common law of Pennsylvania and as to procedure by the Federal Rules of Civil Procedure. The statutory provision believed to sustain the jurisdiction of this Court is Title 28 U. S. Code, Section 1254. The date of the judgment sought to be reviewed is October 5, 1951 (R. 456), which affirms the judgment after mandate dated October 26, 1950 (R. 103a).

The grounds on which this Court has jurisdiction to review the judgment of the Court of Appeals affirming the District Court's judgment after mandate and the reasons for allowance of the writ are stated in the brief.

[2] 175 F. 2d 370 (C. A. 3, 1949). [3] 339 U. S. 934, 959 (1950).

too small or sporadic to create any goodwill and its threatened expansion to places where it had never sold or to consider any evidence of record as to respondent's acts after the filing of the complaint and up to the date of the judgment some ten years later. The District Court vacated all findings of fact and conclusions of law of the Trial Court and entered as new findings and conclusions paraphrases of the general language of the Court of Appeals' opinion and dismissed the suit and complaint with prejudice, except that its "* * * judgment is intended to adjudicate neither the use of 'Budweiser' or 'Bud' after April 20, 1940, nor sales, nor use of the name 'DuBois Budweiser', nor distribution outside of the localized areas of production and distribution of the product of defendant as defined by such sales, use and distribution; * * *" (R. 103a). Petitioner now asks this Court to review the per curiam decision of the Court of Appeals (McLaughlin, Staley and Hastie, C. JJ.) affirming such action by the District Court and its judgment (R. 455-456).

Summary of the Basic Facts.

Since 1876 petitioner and its predecessors have used the word "Budweiser" as a trade-mark for beer (R. 97a) which has been sold on an ever increasing scale throughout the United States except during prohibition, and in 1905 alone petitioner's predecessors sold the equivalent of 444,265 barrels, and in 1945 the equivalent of more than 3 million barrels (R. 98a). During prohibition petitioner and its predecessor widely advertised and sold "Budweiser" malt syrup, yeast and near-beer (R. 100a) and petitioner's wide sales of "Budweiser" beer, malt syrup and yeast have continued to date.

The trade-mark rights of petitioner and its predecessors in "Budweiser" have been favorably adjudicated both prior to 1905 and since then.[4]

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[4] *Conrad* v. *Uhrig*, 8 Mo. App. 277 (St. Louis Ct. of App., 1880); *Anheuser-Busch Brewing Assn.* v. *Fred Miller*, 87 Fed. 864 (E. D. Wis., 1898); *Anheuser-Busch, Inc.* v. *Budweiser Malt Products*

In June, 1905 respondent, which until 1945 never sold more than 90,000 barrels of beer annually, began selling some of its beer under the name "DuBois Budweiser" with full knowledge of the extensive use of the word "Budweiser" by petitioner's predecessors. After timely demand that respondent discontinue use of the name, petitioner's predecessors in 1908 brought suit for an injunction in the Federal Court for the Western District of Pennsylvania (R. 99a). In 1909, with respondent's consent, that suit was discontinued (R. 100a). Between 1909 and 1940 respondent continued to market "DuBois Budweiser" products.

On April 20, 1940, petitioner brought this suit for an injunction against respondent in the District Court for the Western District of Pennsylvania alleging that respondent's sales had been confined to a small area surrounding its plant but that respondent was threatening to expand; and an absolute injunction was granted against respondent (R. 70a). The Court of Appeals for the Third Circuit in reversing the Trial Court, assumed that "Budweiser" had acquired a secondary meaning identifying petitioner (R. 76a), but held that respondent had changed its position and acquired a good will in the name "DuBois Budweiser" within its localized areas of distribution and sustained respondent's defenses of laches and estoppel as to such areas (R. 72a-85a), stating that the parties should be left in the same situation as they were on April 20, 1940 and that equity should refrain from interfering with the status quo (R. 85a).

In the proceedings after mandate, the District Court refused to consider any evidence of record or any facts subsequent to April 20, 1940, the date of the filing of the complaint herein, and refused to consider evidence of record showing respondent's small and sporadic sales in places where respondent had established no good will and its threatened and actual expansion to new territory (R. 200a,

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Corp., 287 Fed. 243 (S. D. N. Y., 1921), aff'd 295 Fed. 306 (C. C. A. 2, 1923); *Anheuser-Busch, Inc.* v. *Cohen*, 37 F. 2d 393 (D. Md., 1930); *Anheuser-Busch, Inc.* v. *Power City Brewery*, 28 F. Supp. 740 (W. D. N. Y., 1939).

207a). After mandate the District Court found that on April 20, 1940 defendant had an existing substantial good will in the name "Dubois Budweiser" in certain areas, localized and defined by prior substantial distribution and sales as distinguished from mere sporadic and occasional distribution and sale of "DuBois Budweiser" beer in such localized areas (R. 101a), but the District Court refused to define geographically the boundaries of the estoppel area constituting the status quo as of April 20, 1940, and the localized territory within which there was such a good will in respondent as distinguished from areas in which respondent had no such good will on that date (R. 206a-207a). Such action by the District Court has been affirmed by the Court of Appeals (R. 455).

The Questions Involved.

Is it in accordance with the accepted and usual course of judicial proceedings:

(a) for a court to decide the main issue, upon which the rights of the parties depend, so indefinitely that it fails to determine whether a defense based on that issue is a partial or complete defense and the parties are remitted to further litigation in which respondent may litigate that issue all over again;

(b) for the courts below to refuse to make any finding or in any way adjudicate whether petitioner was entitled to an injunction restraining respondent from extending its use of the term "Du Bois Budweiser" and from using "Budweiser" in any manner in territory in which respondent had no established good will and in which respondent had made, was making or was planning or threatening to make sales;

(c) for a court to dismiss a suit upon a mere finding that respondent is entitled to the benefit of a defense of estoppel in some degree and to refuse to determine the extent of the estoppel and whether respondent's acts, actual or

threatened, have exceeded the scope of the estoppel, leaving the issue of the scope of the estoppel, as it existed at the time of the commencement of this suit, open for relitigation in a future multiplicity of suits at a possibly remote future time when the evidence bearing on that issue may be lost or obscured;

(d) for a court to refuse to adjudicate that part of petitioner's cause of action, which related to threatened extension by respondent of its sales to territory where it had no established good will when the complaint was filed, and even to consider the undisputed supporting evidence that respondent after the filing of the complaint and before the trial made sales in places where it had never before made sales and consequently where it could have had no established good will.

The reasons for the allowance of the writ are stated in the brief which follows.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Third Circuit, in this action.

WALLACE H. MARTIN,
MINTURN DE S. VERDI,
WALTER J. HALLIDAY,
Counsel for Petitioner.

Dated: December 27, 1951.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Court of Appeals failed to perform its judicial function when it affirmed the District Court's refusal to define the status quo and geographically delimit the boundaries of respondent's localized territory as of April 20, 1940.

The duty to decide every material issue in a case is fundamental, first because upon such decision depends the question whether plaintiff is entitled to a remedy in that litigation, and secondly, because material issues that are litigated, involving facts as of the commencement of the suit, should not be left undecided for future decision in a second suit or multiplicity of suits at possibly remote periods. The net result of the action of the Courts below in this case up to date has been to refuse to decide the material and vital issue of the territorial extent of respondent's localized good will. It is immaterial whether this result came about through a proper construction or an improper construction of the first opinion of the Court of Appeals. If it was a proper construction of that opinion, that the District Court was left free and under a duty to decide the issues not specifically decided by the Court of Appeals in its first opinion, then the Court of Appeals erred in not holding that the District Court had failed to perform that duty. If on the other hand, it be assumed that the District Court and the Court of Appeals on the second appeal properly construed the first opinion of the Court of Appeals, the result has been a disregard by these Courts of the duty to decide.

In either case the net result of the case so far, is a radical departure from the accepted and usual course of judicial proceedings which, we submit, it is the function of this Court to correct. So far as the failure of the Court of Appeals, in its first opinion, to decide the extent and scope

of respondent's territory or specifically to order the District Court to do so was urged as a ground for certiorari upon the former petition the question was then premature and in any event this Court was not at that time called upon to consider what future proceedings might or might not be required when the opinion was subject to a construction which, if carried out by the District Court, would have resulted in the determination of this issue.[4a]

The complaint charges respondent with infringement and unfair competition in selling its beer under the mark "Du-Bois Budweiser", and the prayer for injunctive relief is not limited in any way as to time or place. However, the question as to the territorial limits of respondent's rights, if any, based on laches and estoppel, has been in this case from the beginning. The issue as to territorial estoppel was raised by the pleadings and litigated. The complaint alleges on information and belief that respondent's sales of its goods marked "DuBois Budweiser" have been confined to a small area surrounding its plant in Western Pennsylvania and occasional sales in a few nearby places in New York and West Virginia (R. 31a); and that respondent is threatening to expand its use of "DuBois Budweiser" by various means including attempts to establish new agencies in places where respondent's goods have never been sold before and in which petitioner's products have been sold for many years bearing the term "Budweiser"; and that respondent is now committing such acts and threatens to continue and extend the same (R. 14a).

Respondent's answer denies these allegations (R. 39a) and alleges that during the period from 1905, respondent has sold its "DuBois Budweiser" beer throughout Pennsylvania, West Virginia, western New York and eastern Ohio (R. 41a); and pleads laches of more than 30 years on the part of petitioner during which time it permitted respondent to expend large sums in advertising "DuBois Bud-

[4a] *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 917-920 (1950).

weiser" and in expanding its business of manufacturing and selling "DuBois Budweiser" beer.[5]

Respondent had the burden of proving the existence and extent of the estoppel which it pleaded.[6] The depositions taken by respondent and respondent's exhibits (R. 252a-283a) and testimony to show the claimed territorial extent of respondent's sales were put in evidence at the trial by respondent, and the record clearly shows that respondent was given full opportunity to prove the extent of its sales of "DuBois Budweiser" and was fully aware that the Court was receiving respondent's testimony for that purpose (R. 111a). In admitting respondent's testimony and exhibits as to sales of "DuBois Budweiser", the Trial Judge said " * * * they want to show the extent" (R. 114a).

Since the Trial Court found respondent barred by fraud from relying on the defense of estoppel, it issued an absolute injunction and made no finding as to whether respondent in any locality or area had acquired any good will in "DuBois Budweiser" by reason of any substantial and continuous sales in such area.[7]

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[5] R. 42a. Under the Rules, no reply is required to affirmative defenses. Their denial was automatic and the automatic denial put in issue not only the existence of the estoppel but also the extent thereof if any estoppel should exist.

[6] *Crossett Lumber Co.* v. *United States*, 87 F. 2d 930, 931 (C. C. A. 8, 1937); 31 C. J. S. §§ 159, 160.

[7] R. 70a-71a. So far as the Trial Court's holding, that respondent's use of "Budweiser" should be restrained, applies to territory outside of respondent's "localized territory" its decision has not been reversed and an injunction to protect petitioner's trade-mark rights, thus limited, should have issued pursuant to the opinion and mandate of the Court of Appeals for the Third Circuit. Although the mandate, judgment and opinion of the Court below used the word "reversed", they amount to a reversal only with respect to the injunction against respondent's use of "DuBois Budweiser" in certain undefined territories. In all other respects they are an affirmance of the Trial Court's decree. *Gaines* v. *Rugg*, 148 U. S. 228, 238, 240, 241 (1893); *Latta* v. *Granger*, 167 U. S. 81, 85-86 (1897).

The express basis of the decision of the Court of Appeals was a limited estoppel resulting from a limited change of position by respondent during a period of laches by petitioner in bringing suit. The Court said:

> "Within its localized areas of distribution, DuBois assuredly has acquired over a period of years a good will in the name of 'DuBois Budweiser' * * *" (R. 81a). "* * * that a court of equity should refrain from interfering with the status quo. The parties should be left in the same situation as they were on April 20, 1940" (R. 85a).

The opinion and mandate of the Court of Appeals must be interpreted in the light of rules of law governing laches, estoppel and good will which are well settled in Pennsylvania and elsewhere. Good will is a localized matter and exists only where there have been sales in sufficient volume and continuity to create a real public recognition and acceptance.[8]

The holding of the Court of Appeals that the good will acquired over the years by respondent was confined to its localized territory and was not nationwide, necessarily implies that respondent sustained its burden of proving estoppel only as to such limited though undefined areas.

If this were a territorial case in which defendant had priority in some area as against a plaintiff having priority generally and a national distribution, under established law, the most that such a defendant could cut into the plaintiff's relief would be the extent of the territory in which such defendant had an established trade and good will before the plaintiff entered the particular marketing area. In such

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[8] *United Drug Co.* v. *Rectanus*, 248 U. S. 90, 98-99 (1918); *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 415-416 (1916); *Jacobs* v. *Iodent Chemical Co.*, 41 F. 2d 637, 640 (C. C. A. 3, 1930); *Charles Broadway Rouss* v. *Winchester*, 300 F. 706, 723 (C. C. A. 2, 1924); *Katz Drug Co.* v. *Katz*, 89 F. Supp. 528, 535-536 (E. D. Mo., 1950).

cases, the Courts have uniformly fixed definite boundaries for the trading areas of the parties.[9]

Here it should be remembered that petitioner had many years' priority over respondent everywhere. Respondent's rights are based on estoppel and extend only so far as it sustained the burden of proving the scope of the estoppel. The Trial Court found and the Court below did not reverse it but assumed that the word "Budweiser" had acquired a secondary meaning identifying petitioner.[10] However, the Court of Appeals held petitioner was estopped within a limited area from obtaining injunctive relief against respondent, and that the status quo as of April 20, 1940 should be maintained. Since the scope of the estoppel is limited by the extent of the territory in which respondent acquired a good will in the name "DuBois Budweiser", it was the duty of the Court to fix the geographical limits of that territory and the status quo as of April 20, 1940.

Because laches is only a bar to an injunction in so far as respondent had changed its position in reliance th[illegible]on, petitioner had a cause of action for any and all acts of respondent outside the scope of the estoppel, viz. any and all acts committed or threatened to be committed by respondent in places where it had no established good will. Until the territorial extent of respondent's good will in "DuBois Budweiser" at the time of the filing of the complaint is determined, it cannot be presumed that respondent had not committed or was not threatening to commit acts outside of that territory or that all acts appearing of record to have been committed by respondent

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[9] *Cohn-Goldwater Mfg. Co.* v. *Wilk Shirt Corp.*, 147 F. 2d 767 (C. C. A. 2, 1945); *George W. Luft Co.* v. *Zande Cosmetic Co.*, 142 F. 2d 536 (C. C. A. 2, 1944); *Esso, Inc.* v. *Standard Oil Co.*, 98 F. 2d 1 (C. C. A. 8, 1938); *Tillman & Bendel, Inc.* v. *California Packing Corp.*, 63 F. 2d 498 (C. C. A. 9, 1933); *Jacobs* v. *Iodent Chemical Co.*, 41 F. 2d 637 (C. C. A. 3, 1930); *Chapin-Saks Mfg. Co.* v. *Hendler Creamery Co.*, 254 F. 553 (C. C. A. 4, 1918).

[10] R. 59a, 68a and 76a.

were within that territory. Consequently, until the extent of that territory is determined, it cannot be said that petitioner did not have a cause of action when it brought this suit and is entitled to no relief, and the Court was in duty bound to determine as a prerequisite to deciding this case, the extent of that territory. There can be no presumption or pretense that the Court has in any way decided or purported to decide the extent of that territory. In fact both Courts below have expressly refused to do so. Thereby they have in effect held this material fact immaterial and refused to exercise their judicial functions.

The failure of the Court to perform its duty to decide is made apparent by the absence of any of the following findings either by the Court of Appeals or the District Court:

1. There is no finding that respondent had a good will in every place where it had made any sales, however small or sporadic. Nor can such a finding be inferred or assumed because (a) such a finding would be completely inconsistent with the nature and existence of good will, and (b) finding of fact No. 22 made by the District Court after mandate, with which the Court below did not disagree, expressly recognizes that sporadic and occasional distribution and sales do not create good will.[11] Consequently, the defense of estoppel can not be applicable to places where respondent's sales were small or sporadic nor to places where respondent had not sold but was threatening to extend its sales.

2. There is no finding stating in what localities respondent's distribution and sales had been sufficiently substantial prior to April 20, 1940 (as distinguished from mere

[11] "22. On April 20, 1940, defendant had an existing substantial good will in the name 'DuBois Budweiser' in certain areas, localized and defined by prior substantial distribution and sales as distinguished from mere sporadic and occasional distribution and sale of 'DuBois Budweiser' beer in such localized areas" (R. 101a).

sporadic and occasional distribution and sale) to create good will. Under the decision of the Court below, the estoppel extends only to those localities where a good will has been created. The defense of estoppel was the final issue upon which the case was decided and its scope was in issue and dispute between the parties. The Court below has not decided that issue. It has merely found that there was an estoppel as to some locality without finding where, and has refused to perform its duty to adjudicate the issue of the scope of the estoppel, leaving the parties to a multiplicity of future suits for a determination as of April 20, 1940, as to which the facts and evidence are at issue and of record in this case. Already nearly twelve years have elapsed since April 20, 1940.

It has also left uncertain whether in future suits, the limitation of defendant's localized territory as of April 20, 1940 is to be determined by the evidence in the present case or by whatever evidence may be presented in future suits.

To hold as the Court below has, that all that is necessary for a defendant, who pleads estoppel, to do in order to get a dismissal of a complaint, is to show some degree of estoppel and the question of the scope and extent of the estoppel is to be left for determination in future suits, is, we submit, entirely out of accord with the accepted and usual course of judicial proceedings, for it in effect lays down the unheard of principle that a Court may refuse to decide a material issue and that a party may prove his defense piecemeal in a series of suits.

3. There is no finding that respondent at the time of the filing of the complaint had not made, was not making, threatening or intending to make sales where it had no existing good will. This issue was tendered by the pleadings and proofs and there was substantial evidence requiring an opposite finding. Until a finding is made on this issue, it cannot be said that the defense of estoppel is more than a partial defense or plaintiff is not entitled

to relief, and the dismissal of a complaint without a finding on this issue, was in complete disregard of its duty to adjudicate the case and contrary to the accepted and usual course of judicial proceedings. This phase of the case was completely ignored by the Court below.

The District Court's findings 21 and 22 after mandate are the only findings directed to the scope of the estoppel and the area constituting respondent's territory, viz.

> "21. Within its localized areas of distribution defendant assuredly has acquired over the period of years a good will in the name 'DuBois Budweiser'."
>
> "22. On April 20, 1940 defendant had an existing substantial good will in the name 'DuBois Budweiser' in certain areas, localized and defined by prior substantial distribution and sales as distinguished from mere sporadic and occasional distribution and sale of 'DuBois Budweiser' beer in such localized areas" (R. 101a).

These consist of quotations from and paraphrases of the first opinion of the Court of Appeals. They are inadequate as findings because they are vague circumlocutions delimiting nothing and requiring relitigation of the issues here presented in order to interpret them and fix definite geographical boundaries. The word "localized" is meaningless unless the locality is geographically defined [12] and the word "certain" here used in the sense of "some among possible others" in the expression "certain areas" is too indefinite to constitute a sufficient reference to any established territorial boundary because it is not supported by anything in the findings which fixes here and now the geographical boundaries of respondent's territory.[13]

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[12] *Connally* v. *General Const. Co.*, 269 U. S. 385, 395 (1926).

[13] *In re Mineral Lac Paint Co.*, 17 F. Supp. 1, 2 (E. D. Pa., 1936), affirmed 105 F. 2d 640 (C. C. A. 3, 1939).

Similarly the *John H. Pearson* [14] involved the failure to decide the geographic meaning of the phrase "northern passage" in a charter party. There suit was brought to recover for damage to the cargo and the question was whether the vessel took the "northern passage", as agreed, in going from Gibraltar to Boston. The District Court dismissed the libel for damages and the Circuit Court affirmed.[15] There was no finding as to the meaning of "northern passage". The Court below held that "northern passage" was a term of art, unintelligible when taken by itself, but that the determination of its meaning was not material. This Court reversed and remanded the case for further proceedings holding that the meaning of the phrase "northern passage" as used in the contract was either a question of fact or a question of construction applicable to understood facts, and that the Court should have ascertained what passages there were between Gibraltar and Boston and then determined which of them this vessel was allowed by its contract to choose as the "northern passage".

Until the territorial scope of the estoppel is determined, it cannot be said to be a complete defense covering respondent's acts, and in view of the extension of respondent's sales after April 20, 1940 it constitutes only a partial defense. Even though the opinion of the Court below on the first appeal be regarded as holding that because of its laches petitioner is deemed to have acquiesced in respondent's acts in making sales even in places where they were so sporadic and intermittent as not to establish any good will, such acquiescence at most would bar an accounting but would not bar an injunction against the continuance of those acts after April 20, 1940, their threatened extension on that date or their actual extension thereafter.

As this Court said in *Menendez* v. *Holt*:

> "So far as the act complained of is completed, acquiescence may defeat the remedy on the principle

[14] 121 U. S. 469 (1887).

[15] 14 Fed. 749 (C. C. D. Mass., 1882).

> applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise." [16]

This statement is quoted with approval in *Saxlehner* v. *Eisner*.[17]

The foregoing statements of this Court are precisely applicable to petitioner's right to an injunction (even though it may not be entitled to an accounting) against the continuance of all acts or threatened acts of the respondent which do not fall within the scope of the estoppel, viz. sales or threatened extension of sales by respondent in territory in which it had no established good will. This right was clearly asserted by the petitioner and was in issue in this case but petitioner's right to a decision thereon was denied petitioner by the Courts below by simply refusing to determine the limits of the territory in which respondent had an established good will.

In *First Savings Bank and Trust Co.* v. *Greenleaf*, where the District Court refused because of laches to permit plaintiff to rescind a sale but granted damages as alternative relief, defendant contended on appeal first, that there was an adequate remedy at law for the alternative relief and therefore it could not be joined with the prayer for the equitable remedy and secondly, that having found plaintiff guilty of laches, "there was nothing for the Court to do except to dismiss the suit because laches is a complete defense to a suit in equity." [18] However, the Court of Appeals for the Eighth Circuit rejected the first contention on the ground that the Court had power to determine the whole matter in controversy and said as to the second, "There was no laches

[16] 128 U. S. 514, 524.

[17] 179 U. S. 19, 40.

[18] 294 F. 467, 470 (C. C. A. 8, 1923).

with respect to the alternative relief. * * * In this respect, the suit was seasonably brought." [19]

While the basis of the decision of the Court of Appeals was respondent's change of position by acquiring good will in a certain localized territory which the court refuses to define, there is some reference in its opinion and in the present findings to loss or obscuration of evidence and death of witnesses. This obviously had nothing to do with obscuration or loss of evidence as to the specific territory where respondent had a localized good will on April 20, 1940, for the evidence as to such territory on that date was in respondent's possession and produced by it at the trial. The fact that the evidence as to respondent's localized territory on April 20, 1940 was not obscure or lost is implicit in the Court's ruling that the respondent's good will was in a localized territory at that time and that the respondent could not with impunity expect to expand its sales to other territories. Furthermore, the record shows that there is no loss or obscuration of evidence as to where the respondent had a substantial distribution and sale on April 20, 1940. Respondent itself offered in evidence exhibits prepared from its sales records going back to the end of Prohibition and also for the period before and during Prohibition. Consequently, it cannot be held that the failure to decide the vital issue of the geographical limits of territory where respondent had a good will on April 20, 1940, and the dismissal of the complaint without deciding whether respondent had exceeded these limits was based on the ground of loss and obscuration of evidence. Furthermore, the Court of Appeals by relegating petitioner to future litigation to fix respondent's territory, as of April 20, 1940, in effect postpones the decision on facts existing when the present suit was brought to a possibly remote period, thus introducing by the Court's refusal to determine that fact the element of possible loss or obscuration of that evidence in the future.

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[19] Id. at p. 475.

In the present case clearly the Courts below had the power and duty to make a complete and definitive determination but the suit has been dismissed because of laches without consideration of the issue with respect to which the suit was "seasonably brought" and without determination of the scope or extent of the estoppel which must be determined as a prerequisite of deciding whether or not it is proper to dismiss.

While it was not incumbent upon the Court of Appeals to determine the factual limits of the area in which respondent acquired a good will because fact finding is not a function of an appellate court,[20] the accepted and usual course of judicial proceedings required the District Court to define the status quo and geographically delimit the boundaries of respondent's localized territory as of April 20, 1940. This was the function and duty of the District Court although no specific direction to that effect was incorporated in the mandate of the Court of Appeals for the Third Circuit.[21] The District Court refused to do so and the Court of Appeals in affirming it, failed to dispose of the case in accordance with the usual course of judicial proceedings.

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[20] *Exchange Mut. Life Ins. Co.* v. *Warsaw-Wilkinson Co.*, 185 Fed. 487 (C. C. A. 3, 1910).

[21] *Federal Reserve Bank* v. *Ocean City*, 93 F. 2d 519 (C. C. A. 3, 1937); *Kosak* v. *United States*, 54 F. 2d 72 (C. C. A. 3, 1931); *Steinman* v. *United States*, 185 Fed. 47 (C. C. A. 3, 1911); *Mattley* v. *Giesler*, 202 Fed. 738, 740 (C. C. A. 8, 1912); *Hawkins* v. *Cleveland, C. C. & St. L. Ry. Co.*, 99 Fed. 322 (C. C. A. 7, 1900).

II

Despite the limited estoppel sustained by the Court below as of the date of filing the complaint, there exists upon the pleadings a cause of action against actual and threatened extension of sales by respondent to places outside the area of the estoppel which was not disposed of by the decision of the Court below but which was established by the proofs and entitled petitioner to relief under the law of the case.

A. Petitioner was entitled to a decision on its cause of action as to all areas where respondent had not acquired a "good will" from substantial sales prior to April 20, 1940, and petitioner's right to enjoin further sales by respondent in, or expansion of respondent's sales to, such areas was not affected by petitioner's prior delay.

It is the law of the case that respondent shall not extend its use beyond its localized territory with legal impunity (R. 85a). The complaint in this case, while grounded on principles of unfair competition and trade-mark infringement, is also in the nature of a bill quia timet to restrain an impending or threatened injury. It alleged that respondent threatened to extend its territory [22] and the proofs clearly show that subsequent to April 20, 1940 respondent did extend its territory. While respondent's answer denied these allegations (R. 39a), respondent made no disclaimer as to any territory; its claim from the very beginning that it may sell its beer as "DuBois Budweiser" anywhere (R. 196a) inherently admits the threat; and the record shows not only the continuing threat, but also the actual accomplishment of the extension. In this respect the case is similar to *Goshen* v. *Myers* where the Circuit Court of Appeals [23] held that because the defendant charged with patent infringement had gone out of business the plaintiff had no reasonable apprehension that the infringement would be continued. However, this Court reversed, holding that defendant's answer contesting validity of the plaintiff's patent

[22] Complaint paragraphs 33, 34, 37 and 38; R. 13a-14a.

[23] 215 F. 594 (C. C. A. 7, 1914).

was persuasive evidence that defendant was asserting the right and threatening to continue the infringement.[24]

The decision of the Court below cannot be reasonably construed to mean that respondent had a good will in "DuBois Budweiser" in every area where it had made any sales however small or discontinuous. This being so, as to such areas there was no change of position on respondent's part and the estoppel does not extend thereto. On April 20, 1940, the day the complaint was filed, there was no laches or delay on the part of petitioner in objecting to the threats to extend to new areas which respondent was then making. The effect of petitioner's delay is limited to respondent's past acts in areas where it had made sufficient sales of "DuBois Budweiser" to establish a goodwill. The objection to respondent's current threats on the date of filing the complaint was timely.

As to areas where respondent's sales had been so small or sporadic as to establish no good will, petitioner's prior delay was not a bar to an injunction agaist the continuance of sales of "DuBois Budweiser" by respondent in such areas because respondent had not changed its position as to such areas and the scope of the estoppel against petitioner did not extend thereto. As a result petitioner's cause of action as to such areas beyond respondent's localized territory survived because the estoppel found by the Court below was operative only within respondent's localized territory. Since it is the law of the case that respondent shall not extend its use of "DuBois Budweiser" beyond its localized territory with legal impunity, it follows that respondent's actual extensions and continued threats to extend constitute a continuing menace to petitioner's rights as defined by the first opinion of the Court below, and should be enjoined.[25]

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[24] 242 U. S. 202 (1916).

[25] *Bowles* v. *Cudahy Packing Co.*, 154 F. 2d 891, 894 (C. C. A. 3, 1946); *United States* v. *Aluminum Co.*, 148 F. 2d 416, 448 (C. C. A. 2, 1945); *Champion Spark Plug Co.* v. *Reich*, 121 F. 2d 769, 772 (C. C. A. 8, 1941), cert. den. 314 U. S. 669.

B. The Court below departed from the accepted and usual course of judicial proceedings in affirming the District Court's refusal to consider substantial evidence of record of respondent's threats to extend and actual extension of its territory by sales subsequent to the filing of the complaint on April 20, 1940, in territory where it had no established good will.

On remand, the question of the menace to petitioner's rights through respondent's threats to expand was before the District Court. That it still exists is shown by substantial evidence of record [26] and respondent's continuance in its position that it has claimed the world "since the case started" (R. 196a). This was ignored by the District Court because of its refusal to consider any evidence as to any facts subsequent to April 20, 1940, the date of filing the complaint. Judge Fee said:

> "I say that your complaint in this case dates as of April 20, 1940 * * *. Therefore your decree dates from that date * * *. This is the law that I am laying down" (R. 220a).

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[26] Following are typical instances from numerous examples of record showing respondent's threatened and actual extensions to territories in which respondent had no established good will in "DuBois Budweiser" on April 20, 1940:

A. Subsequent to repeal and prior to 1937 respondent had not extended the sales of its beer marked "DuBois Budweiser" as far east as Lycoming County in Pennsylvania on that radius from DuBois. Thereafter respondent extended its sales to Williamsport in that county and petitioner was notified of such extensions.

B. In 1939, respondent's eastward creeping extensions to territory where it had no established good will are shown by its claimed sales in towns east of Williamsport listed as Dornsife, Herndon, Rebuck and Shamokin, Pa. (R. 272a, 273a, 276a, 277a).

C. The next easterly extensions to territories where respondent had no established good will in "DuBois Budweiser" on April 20, 1940, occurred in that year and included, among others, sales in Harrisburg, Pa. (R. 123a-129a, 132a); Rochester, N. Y. (R. 154a, 159a, 161a, 162a, 164a, 165a, 167a, 169a, 171a, 173a, 174a); West Chester, Pa., where respondent established a new distributorship in May or June, 1940 (R. 135a, 139a, 142a, 145a, 148a); and Binghampton, N. Y., where respondent attempted to establish a distributorship in July, 1940 (R. 153a).

This erroneous ruling [26a] is incorporated in Conclusion 4 of the Conclusions of Law after Mandate (R. 102a), and in this error the Court below has now joined.

In equity, the time of the decree and not of the complaint governs the Court in rendering its decree. This is so because the cause of action for an injunction is not to enjoin past acts but the continuance and extension thereof, and their continuance and extension after the filing of the bill and up to the trial is proof of respondent's intention, at the time the bill was filed, to continue and extend those acts as alleged.[27]

[26a] In addition, the District Court ignored particulars which petitioner was ordered to file as more definite statements of the complaint. Three were filed: on June 13 and December 4, 1940 and March 10, 1947 (R. 17a, 21a, 43a). Under Rule 12(e), then in force, prior to the amendment effective March 19, 1948, such particulars filed by petitioner even as late as 1947 became a part of and supplement to the original complaint. While such particulars were directed to respondent's passing off and misrepresentations, they showed on their face that the threats to extend alleged in the complaint had in fact materialized after April 20, 1940.

[27] *Randel* v. *Brown*, 43 U. S. 389, 405; 2 Howard *406, *423 (on cross appeals from the Circuit Ct. for the Eastern District of Pa.); *Beaver Valley Water Co.* v. *Driscoll*, 51 Dauph. 105, 109 (C. P. Dauphin County, 1941); 8 Standard Penna. Practice 266; *Duplex* v. *Deering*, 254 U. S. 443, 464 (1921); *Record & Guide Co.* v. *Bromley*, 175 Fed. 156, 163 (E. D. Pa., 1910); *U. S.* v. *Gaffney*, 10 F. 2d 694, 696 (C. C. A. 2, 1926); *Civil Aeronautics Board* v. *Canadian Colonial Airways*, 41 F. Supp. 1006, 1008 (S. D. N. Y., 1940); *McCabe* v. *Guaranty Trust Co.*, 243 Fed. 845, 849 (C. C. A. 2, 1917, cert. den. 247 U. S. 505); *Stonega Coke & Coal Co.* v. *Price*, 106 F. 2d 411, 419 (C. C. A. 4, 1939, cert. den. 308 U. S. 618). See also decision on second appeal, id., 116 F. 2d 618, 621; *Continental Securities Co.* v. *Michigan Cent. R. Co.*, 16 F. 2d 378, 381 (C. C. A. 6, 1926; cert. den. 274 U. S. 741); *Champion Spark Plug Co.* v. *Reich*, 121 F. 2d 769, 772 (C. C A. 8, 1941), cert. den. 314 U. S. 669; *Donnelly Garment Co.* v. *Dubinsky*, 55 F. Supp. 587, 601 (W. D. Mo., 1944), aff'd 154 F. 2d 38 (C. C. A. 8, 1946); *Andersen* v. *Shipowners' Association*, 31 F. 2d 539, 543 (C. C. A. 9, 1929); *Brooks Bros.* v. *Brooks Clothing*, 60 F. Supp. 442, 456 (S. D. Cal., 1945), aff'd on opinion below, 158 F. 2d 798; cert. den. 331 U. S. 824; *Tilbrook* v. *Forrestal*, 65 F. Supp. 1, 4 (D. C. D. C., 1946).

III

Repeated decisions of this Court establish that the Court of Appeals did not fulfill the purpose of the Judiciary Act which requires that it finally decide all the issues raised by the pleadings and the evidence in the pending litigation and not carve out part of the litigated issues for retrial in a multiplicity of future suits to be decided as of April 20, 1940, the date of filing the present complaint.

The combined effect of the decisions below compels petitioner to bring a multiplicity of suits to relitigate the territorial issue litigated here and which must be determined in such future litigation as of April 20, 1940, the date of filing the complaint herein though the additional cases required may not be tried for years to come. This is so because the Court below has approved the refusal of the District Court to delimit geographically the localized territory within which the limited estoppel found by the Court below in favor of respondent is operative. Such a needless waste of the time of the Courts and expense to litigants is contrary to orderly procedure. The present case in which the parties are now before the Court and in which the evidence has all been presented or can be supplemented is the appropriate proceeding for the settlement of the entire controversy.

This Court has held that one of the means by which the purpose of the Judiciary Act is carried out is "by casting upon the Circuit Courts of Appeal the duty of finally deciding the cases over which the jurisdiction of those courts is by the act made final", and that the power of this Court to grant, in accordance with the Act, petitions for writs of certiorari, such as the present petition, "in its essence, is

only a means to the end that this imperative and responsible duty may be adequately performed".[28]

This Court has granted certiorari also, to determine whether a Circuit Court of Appeals "had departed from the usual and accepted course of judicial proceedings by deciding the cause upon a ground not presented or argued and hence had deprived the petitioner of his day in Court".[29] The present case involves the failure of the Court below with respect to both these aspects of its duty.

Refusal by a Court of Appeals to consider and determine issues within its jurisdiction has been held ground for reversal in numerous cases which have come before this Court on certiorari or by appeal. Among these are cases where the courts, sitting in Equity, have refused to determine purely legal rights. In a suit over a contract to purchase lands, where the District Court had held the title good and the vendors entitled to liquidated damages, this Court held that the refusal of the Court of Appeals to consider the issue of law and fact upon which the decree depended was error and it reversed the judgment and remanded the case to the Court of Appeals. [30]

In *Twist* v. *Prairie Oil Co.*,[31] this Court held, under somewhat similar circumstances, that the Court of Appeals, believing that the plaintiff was not entitled to relief in equity

> "rightly or wrongly * * * might have ordered the bill dismissed without prejudice to the remedy at law,

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[28] *Lutcher & Moore* v. *Knight*, 217 U. S. 257, 267 (1910), referring to the Judiciary Act of 1891 from which is derived the Act of June 25, 1948, C. 646, 62 Stat. 928 U. S. C. Title 28, Sec. 1254, Subdivision 1, under which this petition is filed.

[29] *Le Tulle* v. *Scofield*, 308 U. S. 413, 416, 419 (1940).

[30] *Liberty Oil Co.* v. *Condon Bank*, 260 U. S. 235 (1922).

[31] 274 U. S. 684 (1927).

or might conceivably have ordered the case transferred to the law docket, or might have considered the case on the merits as on an equity appeal in the view that at such stage of the proceedings it was desirable to hold that the objection to the equity jurisdiction had been waived * * *. But it could not, while refusing to consider the errors assigned, retain the case and adjudicate the merits. This it did when it affirmed the decree * * *.

Because the Court of Appeals should have considered the errors assigned as in an equity cause but did not, we reverse its judgment and remand the case to it for further proceedings in accordance with this opinion".[32]

In another such case, where a judgment by the District Court had been reversed with directions to dismiss and to leave the plaintiffs to their statutory remedy and this Court reversed the decree of the Court of Appeals, it said that, under the rule that a court of equity may administer complete relief between the parties, "a court of equity in awarding relief to one party may impose conditions protecting and giving effect to correlative rights of the other".[33] In remanding the case, this Court directed the ascertainment of damages and made note of the fact that the evidence appeared not to have been taken with a view to an ascertainment of the damages but that there was testimony tending to show that a claim for damages had been asserted, adding, "It of course is admissible to fix the damages by agreement. But if this be not done, there will be a need for a hearing on that question".[34]

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[32] Id. at 692.

[33] *Kinney* v. *Kieffer*, 277 U. S. 488, 507 (1928).

[34] Id. at 508. Similarly in this case, if upon remand it develops that the District Court requires additional evidence to fix definite geographic boundaries of the "localized territory", though respondent had the burden of proving the scope of its estoppel defense, the remedy is not to throw the petitioner out of court because of respondent's default but to take such further testimony as that Court may need.

On the other hand, where a Court of Appeals, overruling a demurrer, affirmed a decree which determined both equitable and legal rights, this Court upheld the judgment, saying that the plaintiffs had been entitled to bring the entire controversy into a court of equity "so that it might be adjudicated in a single suit", and that a court of equity "ought to do justice completely, and not by halves", and that "One of the duties of such a court is to prevent a multiplicity of suits * * *".[35]

The error of declining to consider and decide, although the requirements of jurisdiction had been satisfied, led to reversal by this Court in *Meredith* v. *Winter Haven*,[36] where bondholders sued for a declaration that the city could not lawfully retire its bonds without providing for certain interest payments, and also prayed for an injunction. The Court of Appeals declined to pass on the merits and directed dismissal, without prejudice to proceedings in the State Courts, on the ground that the city law involved was not settled or stable. This Court held that "as is usually the case in suits for an injunction" the declaration of rights prayed was an indispensable prerequisite to the award of one or the other of the forms of equitable relief which the petitioner sought, and that difficulties in ascertaining what the State law may be "do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision."[37] Diversity jurisdiction is conferred on the Federal Courts not to serve their convenience but to enable suitors to assert their rights in these Courts, and the same principles apply where the protection of Federal rights is

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[35] *Camp* v. *Boyd*, 229 U. S. 530, 551-552 (1913). In this case, the jurisdiction of the Courts below is unquestioned. However, these decisions are relevant on failure of the Court below to discharge its duty.

[36] 320 U. S. 228 (1943).

[37] Id. at 231, 234.

involved. The decision acknowledges the discretionary powers which in exceptional cases permit the courts to decline to exercise their jurisdiction, even when duly invoked, and describes the exceptional circumstances, none of which existed in the case which was being decided, and none of which exist in the present case. This Court held that to remit the parties to other courts would further delay disposition of the litigation and it being within the jurisdiction conferred on the Federal Courts by Congress to have their rights adjudicated, the petitioners were entitled to have such adjudication. Therefore the case was remanded to the Circuit Court of Appeals.[38]

This Court has required the decision of material issues in bankruptcy and receivership cases. In *Gerdes* v. *Lustgarten*,[39] in refusing an application for a discharge in bankruptcy, the District Court had assumed the falsity of a financial statement and the bank's reliance upon it, and this Court held that in reversing the judgment of the District Court because of the lapse of time, without passing upon

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[38] Id. at 237, 238. The doctrine of *Meredith* v. *Winter Haven, supra,* was applied by this Court in *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701 (1949); *Williams* v. *Green Bay and W. R. R. Co.,* 326 U. S. 549 (1946) and in each of these cases this Court exercised its power to compel the Court below to discharge its duty to make a decision.

See also *Hecht* v. *Bowles,* 321 U. S. 321 (1944) and *Porter* v. *Lee,* 328 U. S. 246 (1946), applying this doctrine under the emergency price and rent laws. The "public interest" does not distinguish these cases from the present case in any material way. To the contrary, it makes it more apparent that this Court has applied the general rules covering the duties of the Courts in deciding these cases. In *Hecht* v. *Bowles, supra,* this Court said (at page 329) "We are dealing here with the requirement of equity practice with a background of several hundred years of history * * *," and in *Porter* v. *Warner,* 328 U. S. 395 (1946) where an injunction was granted but restitution denied, this Court remanded the case for the exercise of the District Court's discretion with reference to restitution stating "Only in that way can equity do complete rather than truncated justice." (Id. at 398.)

[39] 266 U. S. 321 (1924).

the question of the falsity of the financial statement and merely "expressing doubt" with respect to the evidence of the bank's reliance upon that statement, the Court of Appeals had committed reversible error. Because these were material questions of fact upon which the decision must ultimately depend, and because they had not as yet been decided by either of the Courts below, the case was remanded to the District Court. "If they had been specifically decided by the District Court and only the Circuit Court of Appeals had failed to pass upon them, an appropriate course would be to remand the case to the Circuit Court of Appeals."[40]

The duty to decide all material issues is not adequately discharged by suggesting that the complainant may bring another suit.[40a] This Court so held in reversing a judgment which required the receivers of a corporation to split their causes of action, permitting them to seek enforcement of certain claims but compelling them to go to another court to recover the rest and thus introducing additional elements of uncertainty and causing unnecessary delay, work and expense. In remanding the case, this Court said, "Unquestionably, all matters in the controversies between the parties may be tried and determined more conveniently and promptly in the receivership court than elsewhere.[41]

In an admiralty case, both the District Court and the Court of Appeals had rejected the surety's contention that because of denial of limitation of liability, the claimants must go to other courts which would have jurisdiction on other grounds. This Court, affirming the judgment, said, "Surely, the Admiralty Court, in view of the large powers intended to be given it in such a proceeding, is not so helpless as this. So to hold would be to hold that, unless the petitioner wins, the Court does not have power to administer justice". The limitation of liability statute had been con-

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[40] Id. at 327, 328.

[40a] R. 92a, 97a, 204a, 206a, 207a.

[41] *Alexander* v. *Hillman*, 296 U. S. 222, 243 (1935).

strued and enforced in conformity with the rules governing equity procedure in general, under which the Court "may and will in general proceed to decide all the issues and award complete relief * * *." [42]

These decisions recognize and support the courts in the exercise of their authority to determine all issues, to do complete justice and, by deciding all matters in controversy to prevent multiplicity of action. In practically all these cases, the Court of Appeals had discretionary power in the exercise of their authority, and this discretionary power is expressly recognized or implicit in the decisions. What is more significant from the point of view of the question raised in the present case is the principle, also well established, that the exercise of this discretion is a duty the discharge of which is the concern of this Court.

In references to the rule that a court of equity will administer complete relief and that it has authority to determine all issues duly presented for determination, the language of the decisions often is that the Court "may" administer complete relief, or that it "has authority" to bring a controversy to conclusion and so prevent a multiplicity of actions. But the decisions of this Court make it clear that the rule involves not only power but duty. In many instances, discretionary powers are involved. But the exercise of that discretion is required and where discretion has been exercised by a lower court, the Court of Appeals not only has the power but also the duty to determine whether a lower court had properly used its discretion or had abused it.

Failure and refusal to perform this duty is the fundamental error committed by the Court below in the present case. Issues duly presented and unquestionably within the jurisdiction of the Court are left undetermined. The

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[42] *Hartford Accident Co.* v. *Sou. Pacific*, 273 U. S. 207, 216-217 (1927); *Just* v. *Chambers*, 312 U. S. 383, 386 (1941) is to the same effect.

mandate of the Court of Appeals on the first appeal could reasonably be construed as having intended that these issues be considered and determined by the District Court. But when the District Court refused to consider them, and the Court below supported this refusal by affirming the judgment of dismissal, it became evident that the Court below did not intend to discharge its duty, and that the language in its decision on the first appeal referring to what the defendant might or might not do with impunity must be construed as suggesting renewed litigation to protect rights of the plaintiff which the Court had recognized and had the power to protect but which it refused even to declare and adjudicate. The result is a decree which might be described, in the language of the Second Circuit Court of Appeals in a recent decision, as of dubious efficacy "because it is based on a state of affairs as of a particular time and invites multiplicity and renewal of litigation * * *. It is a temporary solution only".[43] At the most, the Court below corrected what it believed to have been an error in the judgment after trial, with respect to a single issue; it failed even to attempt a disposition of the case with respect to all aspects of the controversy, which is the disposition which justice requires.[44] Thus, the Court below failed to perform the duty contemplated by the statute under which it had authority to hear and decide the appeal.[45]

In reversing decrees which leave undetermined issues, which the court below is empowered to adjudicate and which a party is entitled to have decided, this Court has

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[43] *Schwartz* v. *Mills*, 20 U. S. Law Week, 2206, C. A. 2, November 15, 1951.

[44] *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 555 (1940); *In re Barnett*, 124 F. 2d 1005, 1009 (C. A. 2, 1942).

[45] *Brown* v. *Fletcher*, 237 U. S. 583, 587 (1915); *Lutcher & Moore* v. *Knight*, 217 U. S. 257 (1910).

exercised its power to determine said issues on the record[46] or where the nature of the question or the state of the record has made it appear to this Court to be more desirable that the issues be decided by the court which ought to have decided them in the first instance, it has remanded the case for this purpose.[47] These alternatives were available also to the Court below. The state of the record is such that it could have finally decided all material issues or it could have remanded the case to the District Court for decision. The failure of the Court below to take either course is a departure from the accepted and usual course of judicial proceedings such as calls for the exercise of this Court's power of supervision.

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[46] *Martino* v. *Michigan Window Cleaning Co.*, 327 U. S. 173, 178 (1946).

[47] *Gerdes* v. *Lustgarten*, 266 U. S. 321 (1924); *Virginian Railway Co.* v. *United States*, 272 U. S. 658, 675 (1926); *Lawrence* v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588, 596 (1927); *Times-Mirror Co.* v. *National Labor Relations Board*, 331 U. S. 789 (1947).

CONCLUSION

It being apparent from the judgment after mandate and the findings upon which it is based that the Courts below have not performed their duty to decide material issues, this petition should be granted and the judgment below vacated and the cause remanded with directions to determine the geographic extent of respondent's localized territory in which it had an established good will on April 20, 1940, and to determine what relief, if any, petitioner may be entitled to by reason of any acts that respondent may have committed or threatened to commit outside the said territory.

Respectfully submitted,

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Office - Supreme Court, U. S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

NO. 502

ANHEUSER-BUSCH, INCORPORATED, Petitioner,

v.

DU BOIS BREWING COMPANY, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

NO. 502

ANHEUSER-BUSCH, INCORPORATED, Petitioner,

v.

DU BOIS BREWING COMPANY, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Official Reports of the Opinions Delivered in the Courts Below.

In *Anheuser-Busch, Inc. v. Du Bois Brewing Co.*, 73 F. Supp. 338 (September 9, 1947), the District Court for the Western District of Pennsylvania held that the petitioner Anheuser-Busch, Incorporated, had the exclusive right to use the word "Budweiser" as a name for beer, and enjoined further use of the word by the respondent Du Bois Brewing Company in the trade name of its "Du Bois Budweiser Beer."

In *Anheuser-Busch, Inc. v. Du Bois Brewing Co.*, appellant, 175 F. 2d 370 (May 12, 1949), an appeal by the respondent from the decision of the District Court, the Court of Appeals for the Third Circuit, with-

out determining whether the petitioner had or had not exclusive rights in the word "Budweiser," held that any such rights as petitioner might otherwise have to relief against the use of the word by the respondent had been lost by estoppel, resulting as a matter of law from the petitioner's delay of over thirty years in asserting its present complaint and from changes of the positions of the parties in the meantime. Accordingly, the Court of Appeals reversed the decision of the District Court and directed a judgment dismissing the case. In *Anheuser-Busch, Inc. v. Du Bois Brewing Co.*, 339 U. S. 934 (1950), this Court denied certiorari to review the decision of the Court of Appeals. A petition for rehearing was also denied: *Same v. Same*, 339 U. S. 959 (1950).

In *Anheuser-Busch, Inc. v. Du Bois Brewing Co.*, 191 F. 2d 733 (October 5, 1951), an appeal by the petitioner from the judgment of the District Court (Fee, J.) after mandate of the Court of Appeals, the latter court held that the actions of the District Court in vacating the original findings and conclusions, making new findings and conclusions, and entering judgment dismissing the complaint were in conformity with the previous opinion (175 F. 2d 370) and the mandate of the Court of Appeals. In consequence the judgment of the District Court after mandate was affirmed.

Jurisdiction of This Court.

1. Jurisdiction in this Court is claimed by the petitioner under the provisions of Subsection (1) of Chapter 646 of the Judicial Code, Act of June 25, 1948, 62 Stat. 928, 28 USCA §1254.

2. Petitioner presently seeks a writ of certiorari, in order to have this Court review a judgment of the Court of Appeals for the Third Circuit (R. 456), which judgment affirmed the judgment of the District Court for the Western District of Pennsylvania, entered after mandate of the Court of Appeals. The judgment after mandate dismissed petitioner's complaint, with prejudice, but with the reservation that "this judgment is intended to adjudicate neither the use of 'Budweiser' or 'Bud' after April 20, 1940 (the date petitioner's complaint was filed), nor sales, nor use of the name 'Du Bois Budweiser,' nor distribution outside of the localized areas of production and distribution of the product of defendant as defined by such sales, use and distribution." (R. 103a)

Counter-Statement of the Case.

This case has twice been before the Court of Appeals. On the first appeal, that court entered the decision reported as *Anheuser-Busch, Inc. v. Du Bois Brewing Co.*, appellant, 175 F. 2d 370. By that decision, the Court of Appeals reversed a final decree entered in favor of the petitioner by the District Court for the Western District of Pennsylvania, following the latter's decision reported as *Anheuser-Busch, Inc. v. Du Bois Brewing Co.*, 73 F. Supp. 338. Petitioner then applied to this Court for writ of certiorari. Certiorari was denied (339 U. S. 934, April 10, 1950), and rehearing was likewise denied (339 U. S. 959, May 15, 1950).

Following return of the mandate of the Court of Appeals to the District Court, Judge James Alger Fee,

specially assigned to the latter court, made new findings of fact and conclusions of law (R. 97a-102a) and entered an order, pursuant to the mandate, dismissing petitioner's complaint (R. 103a). Again, petitioner appealed to the Court of Appeals, which court affirmed: 191 F. 2d 733 (opinion printed at R. 455). It is the latter judgment which petitioner seeks to have reviewed by this Court.

The instant petition for certiorari violates Rule 38 (2) of this Court, in that it contains neither "a concise statement of the grounds on which the jurisdiction of the Supreme Court is invoked," nor "a concise statement of the case." Instead, the information which the rule seeks to elicit is scattered throughout the petition in sections variously entitled "Statement of the Matter Involved," "Summary of the Basic Facts," and "The Questions Involved." Even petitioner's reasons for the allowance of the writ are not to be found in the petition, but are said to be stated in its supporting brief. Further, petitioner's presentation of the facts and issues in the case is quite inadequate, and necessitates the following counter-statement.

Petitioner's complaint (R. 9a), filed on April 20, 1940 and made more specific by three bills of particulars filed later (R. 17a, 21a, 43a), was intended to state a cause of action in equity, for injunction against the alleged infringement of a common law trade-mark right claimed by petitioner in the word "Budweiser." The charge of infringement was based upon respondent's manufacture and sale of beer labeled "Du Bois Budweiser Beer." Respondent's answer denied that the word "Budweiser" had been susceptible to appropriation or

had been lawfully appropriated by petitioner as a trademark, or was a word in which petitioner could have an exclusive property right; denied that respondent had ever infringed any such right of petitioner; averred that respondent had made and sold its "Du Bois Budweiser Beer" from the early part of the year 1905 until the commencement of the suit in April, 1940; and averred finally that petitioner's right to complain had been barred by laches and estoppel (R. 35a).

On March 10, 1947, the case came on for trial in the District Court before the late Judge Gibson. Meanwhile, between 1940 and the opening of the trial, the parties had taken the depositions of hundreds of witnesses at numerous points throughout the United States. The trial continued for some five weeks during which the parties offered substantially all of the depositions, plus the testimony of a large number of witnesses and a comparable quantity of documentary evidence.

All of this evidence was directed to the issues made by the pleadings and just described: the only subject not within those issues was that developed by petitioner's unsuccessful (R. 82a, 83a) effort to prove that respondent had been guilty of actual fraud and misrepresentation in the sale of its "Du Bois Budweiser Beer." The now material facts developed by the evidence may be summarized as follows:

Petitioner Anheuser-Busch, Inc. is a Missouri corporation which had, for years before it commenced this suit, owned and operated a brewery in St. Louis, founded originally by the first of a series of its corporate predecessors at some time after the Civil War.

In 1876, Adolphus Busch, who was then the president of the first of petitioner's chain of predecessors, entered into an arrangement with one Carl Conrad, a beer importer, to produce at the brewery in St. Louis beer of a kind not, it seems, previously made in St. Louis, for sale by Conrad under the name "Budweiser Beer" (R. 49a).

Neither Conrad nor Busch had originated the name, and neither one can have intended that it should, in itself, serve the purpose of a trade-mark. From a time long before 1876, "Budweiser" had been the common name applied to beer made by the brewers in the City of Budweis, Bohemia, or made elsewhere according to a recipe or process which had originated in Budweis. This European beer had long been known both to Busch and to Conrad as a beverage of exceptionally attractive quality, and of the highest reputation among beer drinkers. It had been imported to America before 1876, and such importations were to continue, in a very substantial way and subject to interruption only during the Prohibition years, from 1876 until early 1939, when the armies of Adolph Hitler seized Budweis and the other cities of Bohemia, and put an end to business of that kind. It was the purpose of both Busch and Conrad, when they chose the name "Budweiser," to make a close imitation of the European import, and their choice of the European name was intended simply to claim for their product the desirable qualities of the European original (R. 49a, 57a).

From a small beginning, the Busch-Conrad venture in the production of "Budweiser Beer" grew steadily. At some time in the 1880's, Conrad sold his proprietary interest in the business to one of petitioner's prede-

cessors. Thereafter the beer was made in increasing quantities; and by 1905, a significant point of time in this case, the "Budweiser" beer made at St. Louis by those predecessors had become well known throughout widespread sections of the United States. Since 1905 the capacity of the St. Louis brewery, and its production of American-made "Budweiser" beer, have been multiplied several times, by a process of gradual expansion. Over the years, the scope and extent of petitioner's advertising of its product have grown correspondingly. As a result, by the year 1940, petitioner's "Budweiser" beer was probably as well known to the American public as any other brand of beer.

In the meantime, the respondent Du Bois Brewing Company had, between 1905 and 1940, developed a very substantial trade in the competitive "Du Bois Budweiser Beer." Respondent is a Pennsylvania corporation, organized in 1895, and has at all times since owned and operated a brewery at Du Bois, Pennsylvania, which, although by no means as big as that of petitioner, is nevertheless a large and thoroughly respectable business enterprise.

Respondent's organizer, and its president from 1895 until his death in 1932, was Frank J. Hahne, Sr., a native of Germany, who devoted his entire business career to the brewing industry. He was undoubtedly familiar with the characteristics and reputations of European beers and with the methods of brewing employed in Germany and Bohemia.[1] In 1905, under Mr. Hahne's

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[1] Pages 250a, 251a of appendix to appellant's brief in the Court of Appeals, on the first of the two appeals to that court.

management, respondent put on the market a series of new beers, which were advertised at the time as imitations of the "German originals," and which were labeled respectively "Du Bois Pilsener Beer," "Du Bois Wurzburger Beer" and — the one now important — "Du Bois Budweiser Beer." Manufacture of the "Du Bois Budweiser Beer" continued without interruption from June, 1905 until the advent of Prohibition in 1919. During the Prohibition years, respondent produced a "near-beer" which was sold under the name "Du Bois Budweiser Cereal Beverage." Immediately after Repeal, the production and sale of "Du Bois Budweiser Beer" were resumed, and have been continued ever since.

It has been an important fact of the case that, from the beginning, the labels, bottles and other containers used by respondent have been entirely different in appearance from those used by petitioner. The labels of petitioner and respondent have had in common only their use of the word "Budweiser" (R. 68a, 74a).

Although at all times between 1905 and 1940 petitioner was fully informed of respondent's production and sale of the "Du Bois Budweiser Beer," and although it had conceived the idea of excluding all others from using the word long before 1905, it never found it possible to make any effective objection to the respondent's practice. In October, 1905, petitioner's predecessor demanded that respondent discontinue its use of the word "Budweiser," later reinforcing its demand by bringing a suit for injunction, in September, 1908, in the United States Circuit Court for the Western District of Pennsylvania. Respondent, in response to these demands, insisted that the word "Budweiser" was one which it had a right to

use, and made clear its intention to defend and continue its use. In 1909 petitioner voluntarily discontinued its suit for injunction; and it never made any further complaint against respondent until 1940, when this suit was commenced (R. 74a, 75a).

Although the individuals who were concerned in the controversy of 1905-1908, over respondent's use of the disputed word "Budweiser," were all dead long before this suit was begun, the public records of the period make clear the existence of compelling reasons to explain why petitioner's predecessors were obliged to withdraw from that controversy. The records show that the right of the St. Louis brewery to use the word "Budweiser" was under attack in the Patent Office by the brewers and importers of the European "Budweiser" beer. It was the contention of the Europeans, in the Patent Office proceedings, that petitioner's use of the word "Budweiser" was a wrongful infringement of their rights, particularly when the word was used in combination with the word "original" (Defendant's Exhibit 7 R's). After extended negotiations in Budweis, in 1910 and 1911, Adolphus Busch and Carl Conrad—still employed by the Anheuser-Busch corporation of that period—were able to extricate petitioner's predecessor from its difficulty, and to obtain what were in effect territorially limited licenses to continue the manufacture and sale of the American-made "Budweiser," by making substantial money payments to the Bohemian brewers and by agreeing to refrain in the future from using the word "original" on petitioner's labels.[2] In the meantime,

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[2] Pages 65a-67a of appendix to appellant's brief in the Court of Appeals, on the second of the two appeals to that court.

litigation with the respondent Du Bois would have been most imprudent; and after the settlements were made it must have seemed both morally and legally impossible. Messrs. Busch and Conrad and their associates could hardly have turned at once from the purchase of a limited and non-exclusive right to use a word, to litigation based on the proposition that their company was sole owner of that same word.

Respondent's success — by default — in its controversy of 1905-1908 with petitioner, resulted in no conduct on its part which the latter asserted to be legally objectionable, during the next thirty-odd years. Between 1908 and 1940, respondent never made any effort to obtain nation-wide distribution of its products. However, its "Du Bois Budweiser Beer" became known, during those years, in a substantial part of the East. By 1940, the records of respondent's sales of earlier periods had in large part been destroyed or lost, and it was impossible at the trial to determine or state with precision the extent of the territories in which respondent's beer had been known. However, it was shown positively, by the testimony of a multitude of witnesses, that by 1919 "Du Bois Budweiser Beer" had been sold and generally known throughout almost the whole of Pennsylvania, in large sections of the States of New York, New Jersey, Ohio and West Virginia, and at many points in the New England States. A tabulation of the ultimate facts shown by this evidence is attached to this present brief.

In considering the exhibits printed by petitioner at R. 252a to 283a, it is important to observe that they were not prepared or presented in any effort, on the part of

either party to the case, to determine with precision the extent of respondent's sales territory at any particular time, least of all to establish that territory as of April 20, 1940. Instead, these exhibits were prepared pursuant to demands made by petitioner in a motion (R. 292-299) which stated purposes having no apparent relationship to the territorial question, and under an interlocutory decision of the court below: *Anheuser-Busch, Inc. v. Du Bois Brewing Co.*, 3 F.R.D. 336 (February 10, 1943), which reflects this limitation of petitioner's purposes in making its demands.

Petitioner's complaint contained a more or less routine averment (Paragraph 34, R. 14a) to the effect that respondent was threatening "to expand its use of 'Du Bois Budweiser' by various means including attempts to establish new agencies in places where defendant's goods have never been sold before * * *." Although petitioner's present brief attempts to make some use of this averment, it is sufficient to observe that no evidence was offered in support of it at the trial, and that no such point was made by petitioner either in the original proceedings in the District Court or at any other stage of the case, until after the Court of Appeals had filed its opinion on the first appeal. The three more definite statements of complaint filed by petitioner are of no value on this point. These three papers contained averments which were expressly intended to amplify Paragraphs 2, 3, 4, 8, 18 to 29, and 38 of the complaint, but they contained no reference or relationship whatever to Paragraph 34 (See more definite statements, R. 17a, 21a, 43a.).

In this connection, it is important to recall the undisputed fact that petitioner's decision to commence this case was in no way related to any change in the respondent's management, in its commercial practices, or in its use of the name "Du Bois Budweiser Beer." After the death of Frank J. Hahne, Sr., in 1932, his son, Frank J. Hahne, Jr., became president and manager of respondent's brewery and has continued in that capacity ever since without—so far as the record shows—making any change in the policies previously established by his father. There is no credible evidence whatever of any change in respondent's labels or in its advertising or selling methods between the repeal of Prohibition and the beginning of this action. There was no change or material expansion of its territory. For practical reasons, respondent was never able, after Repeal, to resume sales of its beer throughout the entire territory which it had occupied before Prohibition, so that its sales territory in 1940 was simply a substantial part—but not the whole—of its territory in 1919 (See R. 252a-283a, also Table attached to this brief.).

Petitioner's decision to bring this suit was, it follows, not the result of any change in respondent's sales practices or its sales territories from those familiar to petitioner for thirty-five years. Instead, the decision was an accidental consequence of petitioner's choice of the year 1938 as an opportune time to eliminate further competition on the part of the brewers and importers of Bohemian "Budweiser" beer. The record is clear. After Repeal, the two large breweries at Budweis had resumed sales of their "Budweiser" beer in this country. Petitioner was obliged to recognize, and did recognize, their right to do so (See Plaintiff's Exhibit 101-J.). Then, on September 27, 1938, at a time when Adolph

Hitler's threats to invade Czechoslovakia were a subject of world-wide interest, petitioner's board of directors suddenly directed its officers and legal counsel to take such action as might be necessary to eliminate the further use of the word "Budweiser" by the two brewers at Budweis, and—incidentally it seems—by the Du Bois Brewing Company.

Pursuant to this resolution, petitioner's representatives went to Bohemia and, in a long negotiation which was concluded early in 1939, on the eve of the German invasion and the consequent virtual extinction of commerce between Bohemia and the United States, they were able to purchase of the Bohemian brewers and their agents, in exchange for substantial payments of cash (which were to be made at points outside German jurisdiction), agreements by the Bohemians to withdraw from the American market (R. 61a, 67a, Plaintiff's Exhibits 101-H, 101-K, 101-M).

It was only after this transaction was concluded that petitioner's officers and counsel took any action adverse to respondent. Even then, it appears that they found in existence no evidence of any previous impropriety or pretended impropriety on respondent's part, except its long-standing use of the word "Budweiser." At the trial they produced not one word of testimony and not one exhibit concerning anything else, which antedated September 27, 1938. The necessary conclusion, that petitioner first determined to commence this case and then set about procuring evidence that it had a case to bring, is corroborated by such testimony as that of petitioner's witness Stewart E. Lyke, printed at R. 351-358.

In his decision reported in 73 F. Supp. 338 and reversed by the Court of Appeals on the first appeal, the trial judge gave no weight to the indisputable facts concerning the origin of the word "Budweiser," the circumstances of its adoption by petitioner's predecessor, or the intervening uses by the Bohemians and others. He held that by virtue of its successful efforts to advertise and sell the St. Louis-made "Budweiser Beer," petitioner had, by 1905, acquired an equity or interest in the word which made unlawful its competitive use by respondent or any others, except perhaps the Bohemian brewers and their agents. He rejected petitioner's rather feeble efforts to explain its delay of thirty-five years in pressing enforcement of its alleged rights (R. 54a, 55a), but offset that rejection by sustaining petitioner's contentions that the infringement of a trade name is *per se* a fraud, and that no period of laches, however long, and no resulting change of position on the part of the alleged infringer, can protect such an infringement from injunctive relief.

Pursuant to the trial judge's decision, on October 2, 1947 the District Court entered the final decree from which respondent took the former appeal: a decree which enjoined respondent from any further use of the word "Budweiser" or any confusingly similar word in the label or trade name of its beer (R. 71a).

As will appear by reference to the briefs filed in the Court of Appeals, the only questions presented on the first appeal to that court were those stated in its opinion, namely: the question whether petitioner had possessed a trade-mark right in the word "Budweiser" in 1905, and

the question whether, even if petitioner had possessed such a trade-mark right, its right to relief had been barred by estoppel growing out of its laches in seeking such relief, between 1905 and 1940. *No question of localized territory was raised or suggested by either party.*

On May 12, 1949, the Court of Appeals handed down its opinion (175 F. 2d 370, R. 72a-85a). It held that respondent had not been proven guilty of any fraud; that it had adopted the name "Du Bois Budweiser Beer" and used it in good faith; that the position of respondent had changed, to the prejudice of its capacity to defend such a case, during the thirty-five years between 1905 and 1940; and that, as a result, by 1940 petitioner had been estopped as a matter of law to bring any action against such uses of the word "Budweiser" as respondent made at that time. In this situation, the Court of Appeals held it was unnecessary to the disposition of the case to pass upon the debatable question of the validity of the petitioner's claims to exclusive rights in the word "Budweiser," and therefore it refused to decide that question. At the end of its opinion, the court pointed out, however, that petitioner's laches, or its acquiescence in respondent's uses of the word "Budweiser" in the "localized" eastern territory where "Du Bois Budweiser Beer" was sold in and prior to 1940, would not estop petitioner from complaining of sales of respondent's beer in new territories. Finally, the opinion held that the judgment or decree of the District Court should be reversed (175 F. 2d 370, R. 85a).

On June 28, 1949, a few weeks after this opinion of the Court of Appeals was handed down, petitioner filed

two petitions in that court: a petition for rehearing (R. 407) and a petition for leave to filed a supplemental bill of complaint in the District Court (R. 411).

In the petition for rehearing,—not otherwise important here—petitioner asserted that the opinion reversing the judgment of the District Court called for a mandate which would require the latter court simply to dismiss the case without qualification (R. 409), and suggested that, in order to protect petitioner's rights, the Court of Appeals should amend its decision by directing a dismissal without prejudice to petitioner's rights to bring suits against the sale of "Du Bois Budweiser Beer" in new territories, and should also direct the District Court to "delimit * * * in its decree" the territory in which respondent's beer had been known and sold at the commencement of the action (R. 410).

The petition for rehearing was denied by the Court of Appeals, without opinion, in an order entered on July 27, 1949 (R. 92a).

In the petition for leave to file a supplemental bill of complaint (R. 411), petitioner averred, on the strength of a number of affidavits, that in April and May of 1949—at times before the publication of the opinion of the Court of Appeals,—respondent's "Du Bois Budweiser Beer" had been offered for sale in the neighborhood of Binghamton, New York, and in St. Lawrence County, New York, these being, the petition averred inaccurately, places "several hundred miles beyond any area which may be termed defendant's 'localized territory.'" The petition asked the Court of Appeals to grant petitioner leave to file in the court below a supplemental bill, reopening the case to permit proof and

adjudication of these alleged new or extended uses of the name "Du Bois Budweiser Beer" (R. 411).

On July 27, 1949, at the same time that it denied the petition for rehearing, the Court of Appeals denied petitioner leave to file a supplemental bill of complaint, and so to reopen the case. The order then entered stated the court's conclusion that the matters described in the petition for leave to file a supplemental bill of complaint "can more properly be determined by the filing of a new bill of complaint" (R. 92a).

In the meantime, respondent had not been called upon to file and had not filed any answer to petitioner's petition for leave, etc., or to the supporting affidavits. Even in this absence of any formal contradiction, however, the subsequent circumstances leave little doubt about the character or the real value of the affidavits. Had the affidavits reflected the existence of any real injury to the legal interests of petitioner, it must be supposed that the latter would have taken some further action to redress it, after the petition for leave, etc., was denied. Instead, although two and one-half years have passed, no new bill of complaint has been filed; and, what may be even more significant, petitioner has not laid any of the affidavits or any of their subject matter before either the District Court or the Court of Appeals in any of the proceedings since the petition for leave, etc., was denied.

In due course after its petitions for rehearing and for leave to file a supplemental complaint were denied, petitioner filed its petition for certiorari in this Court. This petition was denied without opinion: *Anheuser-Busch, Inc. v. Du Bois Brewing Co.*, 339 U. S. 934;

(April 10, 1950). A petition for rehearing was likewise denied in a memorandum order entered on May 15, 1950: *Anheuser-Busch, Inc. v. Du Bois Brewing Co.*, 339 U. S. 959.

On May 18, 1950, after this Court had sent down its last-mentioned order, the Court of Appeals issued its mandate returning the record to the District Court: a mandate in the usual form, ordering "that the decree of the said District Court be, and the same is hereby reversed * * *." (R. 431, 432). On the following day, May 19, 1950, the mandate was received in the District Court and entered on its docket (R. 4a).

There was no further proceeding in the case until, some sixty days later, on July 20, 1950, petitioner filed in the District Court a motion and a companion "Petition to Delimit Territory" (R. 93a, 94a), by which it prayed that court to make "an order describing and delimiting the area and extent of defendant's localized territory in which it had an established good will and business in selling its beer marked 'Du Bois Budweiser' on April 20, 1940 and containing such additional provision as may be necessary to protect and enforce the respective rights and interests of the parties" (R. 93a).

It should be noted that petitioner did not, in these papers, offer the District Court any description or purported description of the "localized territory," or any suggestion of the type or kind of order it thought desirable in addition "to protect the respective rights and interests of the parties."

On September 26, 1950, the case was called for further hearing in the District Court on the "Petition to

Delimit Territory" and other matters, before District Judge James Alger Fee, of Oregon, specially designated to hear cases in Pittsburgh at that term. By successive adjournments, the hearings were continued on October 6 and 20, and concluded on October 26, 1950, when the District Court entered its "Judgment after Mandate" (R. 103a). In these proceedings no testimony was taken; instead, during the four days of hearings the court heard arguments upon the manner and form in which it should dispose of the case.

At the outset of the hearings, petitioner urged that the court grant its "Petition to Delimit Territory" and (unless the matter should prove subject to amicable stipulation) proceed with the hearing of evidence intended to fix the limits of the "localized territory" (R. 179a-182a). Petitioner pointed out that in the earlier stages of the case the extent or limits of that territory had been neither considered nor determined by the court (R. 180a). Later in the hearing, to reinforce its petition, petitioner sought to file a supplemental bill of complaint (R. 203a)—without, however, tendering any such pleading for the consideration of the court, or making known what its allegations would be, or suggesting that respondent had made any sale in any new territory.

In response, respondent opposed the "Petition to Delimit Territory," contending that, under the decision of the former appeal, petitioner's remedy against sales of "Du Bois Budweiser Beer" in new territories must be the subject of a new and separate suit (R. 191a). Respondent moved the court to enter a final judgment on the mandate, dismissing the complaint, but without prejudice to petitioner's right to prosecute a new action

or actions, should it be claimed that respondent had sold "Du Bois Budweiser Beer" in any new territory (R. 204a).

Disposing of all these motions and proposals, Judge Fee made an order which denied petitioner's application for leave to file a supplemental bill of complaint (R. 97a). He refused to go into hearings concerning the limits or boundaries of the territory in which "Du Bois Budweiser Beer" had been known and sold on April 20, 1940 (R. 207a), or otherwise to reopen the case for consideration of this territorial question. Pursuant to a request by petitioner that he make and file new findings of fact (R. 197a), Judge Fee entered a series of "findings of fact and conclusions after mandate" (R. 97a-102a) in language adapted largely from a draft submitted by petitioner, but which was—as Judge Fee had directed—intended simply to paraphrase the facts stated in the opinion of the Court of Appeals on the first appeal.

Finally, at the close of the hearings, on October 26, 1950, Judge Fee signed and the District Court entered a final "judgment after mandate" by which the findings and conclusions entered by the District Court before the first appeal were vacated, and by which the case was dismissed, with prejudice, but with reservations of petitioner's rights to bring new actions testing the legality of sales of "Du Bois Budweiser Beer" in new territories, or—regardless of any territorial limitation—the legality of any alleged wrongdoing of respondent after April 20, 1940 (R. 103a).

On November 24, 1950, petitioner appealed from the final "judgment after mandate" so entered by the District Court. The appeal was argued before Judges McLaughlin, Staley and Hastie. In a *per curiam* opinion

filed October 5, 1951 (R. 455) the Court of Appeals affirmed, stating explicitly that Judge Fee had correctly interpreted its opinion and mandate when he set aside the original findings and conclusions of the District Court, made new findings and conclusions consonant with the first opinion of the Court of Appeals, and entered judgment of dismissal. Implicit in this affirmance of the judgment was the court's approval of Judge Fee's action in declining, under petitioner's complaint of 1940, to set a boundary on respondent's sales territory, and in refusing to entertain a supplemental bill covering supposed recent extensions of such territory.

Petitioner now asks for a review of the latest judgment of the Court of Appeals.

ARGUMENT.

I.

The Present Petition for Certiorari Should Be Denied, Because It Raises No Question Not Raised by the Earlier Petition in This Case.

1. *The present petition is based solely upon the failure of the courts below to investigate and determine the extent of the "localized territory" in which "Du Bois Budweiser Beer" was sold on or before April 20, 1940.*

Reduced to ultimate terms, petitioner's complaint is that the Court of Appeals and the District Court have refused, erroneously, it is contended, (1) to define the geographical limits of the territory in which respondent sold its "Du Bois Budweiser Beer" on and prior to April 20, 1940 (the date this suit was instituted), and (2) to receive evidence of sales by respondent beyond such limits at times subsequent to the filing of its complaint. That such is the fact is evidenced by a mere reading of the headings of the various sections of petitioner's argument (pp. 7, 19, 21, 23). In Section I of that argument, petitioner complains because the courts below did not "geographically delimit the boundaries of respondent's localized territory as of April 20, 1940." In the remaining sections petitioner argues that the court should have received evidence that respondent, after the filing of the complaint, sold its product beyond such "localized territory."

Since evidence of sales in any specific place or area cannot rightly be said to be *beyond* a localized territory

unless the localized area itself has been defined, it seems obvious that petitioner's present petition rests, basically, upon the fact that the courts did not, in the present case, fix the boundaries of the area wherein respondent sold its beer prior to April 20, 1940.

2. *The original decision by the Court of Appeals called for dismissal of the complaint without further consideration of the question of "localized territory."*

When this case first came before the Court of Appeals, the question of "localized territory" was not raised or argued. That matter had not been laid before the District Court. The latter had not been requested to fix, and did not fix, any territorial boundaries of any kind. Instead, in the District Court, petitioner had simply contended for an absolute monopoly in the word "Budweiser," and had sought to enjoin respondent from the use of that word at any time and in any place. In the Court of Appeals, petitioner maintained the same position and argued only for an affirmance of the District Court's judgment, which had forbidden all use of the word by respondent; the question of territorial boundaries was not mentioned in its brief.

It was only *after* the Court of Appeals had filed its first opinion (R. 72a; 175 F. 2d 370) that petitioner sought to have the limits of respondent's territory defined. By its opinion on the first appeal, the Court of Appeals had held that it was unnecessary to decide whether petitioner had the right to exclusive use of the word "Budweiser," because, even if it had, its right to complain against respondent's use of the word had been lost by its *laches* and estoppel over a period of more

than thirty years. Accordingly, the opinion concluded with the words, "the decree of the lower court will be reversed" (R. 85a).

This, of course, required a vacation of the injunction and a dismissal of petitioner's complaint. Realizing that such would be the case, petitioner, after publication of the opinion but before the mandate issued, sought a rehearing (R. 407), and in its petition averred (R. 409):—

> "A mandate such as the opinion seems to call for, merely reversing the decree of the lower court, would seem to require the District Court to dismiss the bill of complaint without qualification."

Accordingly, the petitioner asked the Court of Appeals to direct the District Court "to dismiss without prejudice as to plaintiff's cause of action in territory outside of defendant's 'localized territory' *and to delimit such territory in the decree.*" (Emphasis supplied.) A rehearing was, however, refused (R. 429).

At the same time, the Court of Appeals also denied a request by petitioner for leave to file a supplemental complaint, wherein it was proposed to charge respondent with having, nine years after April 20, 1940, sold its Du Bois Budweiser beer at places beyond "any area which may be termed defendant's 'localized territory.'" (Petition, R. 411; Order, R. 430).

In this state of the record, it was clear that the Court of Appeals proposed to issue a mandate which would call for an unqualified dismissal of the complaint. The question whether the limits of the "localized territory" should be investigated and determined had been brought to the attention of the Court of Appeals, had

been considered by it, and had been ruled adversely to petitioner. That court's decision, therefore, taken in its entirety, contemplated only that the suit should be dismissed, and no further consideration given to the matter of "localized territory."

3. *The former petition for certiorari which was denied by this Court complained because the Court of Appeals had refused to consider the matter of "localized territory."*

Before the mandate had issued following the first opinion of the Court of Appeals, petitioner applied to this Court for certiorari. The application was docketed here at No. 495 October Term, 1949. In the petition and an accompanying brief, petitioner complained at length of the refusal of the Court of Appeals to define the limits of the areas wherein Du Bois Budweiser beer had been sold on or before April 20, 1940. For example, on page 25 thereof, it stated one of the "Questions Presented" to be:

"17. Does the usual and accepted course of judicial proceedings justify or permit dismissal of the complaint on the merits * * * (d) on the ground that during the period of delay by petitioner in instituting this suit, respondent had changed its position and established 'within its localized areas of distribution * * * a good-will in the name of "Du Bois Budweiser"' * * * *without making a finding delimiting such areas* * * * *or without remanding the case to the District Court for that purpose?*" (Emphasis supplied.)

Pointed attention was given to this question in the body of the petition (pages 44 to 47), and an argument made thereon at pages 77 and 78 of the supporting brief, concluding with the statement (p. 78):—

> "Under the doctrines applied by the court below, petitioner was entitled to a determination by the trial court of the facts with respect to the localized territory, and to an injunction against the extension of respondent's use of 'Du Bois Budweiser' beyond this localized territory."

Thus the petitioner's clear understanding of the consequences of the first decision of the Court of Appeals, and its challenge of the correctness of the decision that the suit should be dismissed without a determination of the extent of "localized territory," were definitely presented to this Court.

4. *In this situation, the subsequent judgment entered by the District Court correctly interpreted the mandate and simply carried into effect the original decision of the Court of Appeals.*

After this Court had denied the petition for certiorari, the Court of Appeals returned the record to the District Court, with its opinion and a mandate that the judgment be reversed (R. 431). It is plain that the judgment of the District Court thereupon entered by Judge Fee (R. 103a) was that called for by the mandate. Entirely apart from the order of the Court of Appeals (R. 430) which held that petitioner might raise the question of "localized territory" only in a new action, the opinion of that court on the first appeal made clear its

conclusions that petitioner should have no relief in this case. For example, the opinion held that the doubtful question whether the petitioner could be granted any monopoly in the word "Budweiser" need not be decided, because (R. 76a):—

> "* * * Anheuser *would be denied injunctive relief* here even if 'Budweiser' does have a secondary meaning as the product of Anheuser." (Emphasis supplied.)

And it explained the decision further in these words (R. 76a):—

> "This brings us to *the question whether Anheuser is here entitled to injunctive relief,* if it be assumed *arguendo* that the word 'Budweiser' did acquire a secondary meaning as a product of Anheuser." (Emphasis partly supplied.)

—and (R. 77a):—

> "The questions, then, are (a) whether 'laches' is the most appropriate term which may properly be applied to the inactivity of the Association and Anheuser toward Du Bois, and (b) whether Du Bois was proved to be guilty of fraudulent conduct. *To prevail, Anheuser needs an affirmative answer to both questions. The majority of this court holds against Anheuser on both."* (Emphasis supplied.)

—and, finally (R. 85a):—

> *"Accordingly, we believe that a court of equity should refrain from interfering with the status quo.* The parties should be left in the same situation as they were on April 20, 1940, the date of filing of the instant complaint. Anheuser has permitted Du Bois to conduct a localized operation over so long a period

of time that it would be inequitable to compel Du Bois to surrender use of the name at this time. By the same token, Du Bois, having confined the sale of its Du Bois Budweiser product to localized territory, should not expect to extend its use of that name to other areas with legal impunity.

"For the reasons stated, the decree of the lower court will be reversed." (Emphasis supplied.)

It would be hard to find language which would make clearer the court's conclusion that petitioner was entitled to no relief in this case, or the intent to use the word "reversed" in its usual sense, in appellate decisions of cases on the merits, as meaning that the decision of the court below should be set aside and annulled.[3] Accordingly, it cannot be urged with any propriety that the District Court erred in entering its judgment of dismissal.

In proceeding under the mandate, the District Court had no power or jurisdiction except to carry into effect the decision of the Court of Appeals. Under a well-

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[3] See *Herzberg's Inc. v. Ocean Accident etc. Corp.*, 132 F. (2d) 438 (C.A. 8, 1943); *Walsh Construction Co. v. U. S. Guarantee Co.*, 76 F. (2d) 240 (C.A. 8, 1935); *Goepfert v. City of Beach*, 154 F. (2d) 743 (C.A. 8, 1946); *I.T.S. Rubber Co. v. Tee Pee Rubber Co.*, 295 Fed. 479 (C.A. 6, 1924); and *Wenborne-Karpenpryer Co. v. Cutler Dry Kiln Co.*, 21 F. (2d) 692 (W.D. N.Y., 1927). Such cases as *Federal Reserve Bank v. Ocean City*, 93 F. (2d) 519 (C.A. 3, 1937) and those cited with it at page 18 of petitioner's brief here are readily distinguishable. They were not decisions on the merits, and therefore they necessarily contemplated further proceedings in the courts below.

settled rule of law, petitioner had no right to call upon the District Court, in the proceedings after mandate, to reconsider or to make any new determination of any of the questions which had been considered and disposed of by the Court of Appeals on the first appeal. It was the duty of District Judge Fee, in the proceedings before him, simply to carry into effect the decision expressed by the mandate. He had no power to do anything more. He could not add to, take away from, vary or qualify in any way the decree called for by the mandate. He could only enter a judgment in strict compliance with the mandate, and this he did.

The rule of law by which Judge Fee was bound has often been stated and applied; and the decisions make it clear that after the decision of an appeal from a final judgment on the merits, the District Court cannot, in the absence of plain direction to do so in the mandate, reopen the case for the consideration and determination of any additional issue. This rule was stated with clarity in *Sibbald v. United States,* 12 Pet. 488, 492; 9 L. Ed. 1167, 1169 (Baldwin, J., 1838), as follows:

> "* * * Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. *They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief,* or review it upon any matter decided on appeal for error apparent, *or intermeddle with it, further than to settle so much as has been remanded.* (1 S.C., 194, 197; 1 H. & M., 557; 3 Menif., 228). After a mandate, no rehearing will be granted. It is never done in the

House of Lords (3 Dow. P.C., 157); and on a subsequent appeal, nothing is brought up but the proceeding subsequent to the mandate. (5 Cranch, 316; 7 Wheat., 58, 59; 10 Wheat., 443.)" (Emphasis supplied.)

There has been no departure from the rule. In *Pocono Rubber Cloth Co. v. Livingston,* 92 F. 2d 290 (C.A. 3, 1937), it was held that in proceedings upon a mandate the lower court must grant no relief not clearly called for by the mandate. The plaintiff brought suit for injunction against infringement of a trade-mark, and for damages. The District Court granted an injunction, but awarded no damages. On defendant's appeal, the Court of Appeals modified the injunction, and in all other respects affirmed the decree. Thereupon, on petition of plaintiff, the District Court considered the matter further, and awarded damages. On a second appeal the Court of Appeals reversed, saying:—

"When a case in equity has been carried to an appellate court, and the mandate from that court goes down to the trial court, it is the duty of that court to enter a decree in conformity with the mandate *and do nothing contrary to it or vary it.* D'Arcy v. Jackson, etc., Co. (C.C.A.) 212 F. 889; Richards v. Harrison et al., (D.C.) 218 F. 134, 137; Williams v. Ansehl (C.C.A.) 279 F. 550; Goldwyn Pictures Corporation et al. v. Howells Sales Co., Inc. et al. (C.C.A.) 287 F. 100, 102. In entering the decree allowing damages and profits, the District Court went beyond the law of the case and exceeded its authority." (Emphasis supplied.)

In *Cold Metal Process Co. v. United Engineering & Foundry Co.,* 43 F. Supp. 375 (1942), the court recog-

nized and applied the rule of the *Pocono Rubber Cloth Company* case to forbid the introduction of a new issue by counterclaim, after an appeal, even though all the other issues remained open to full consideration in the District Court.

In the case at bar, the District Court was well aware of the limitation of its power, and in dismissing the bill of complaint, faithfully obeyed the mandate which expressly ordered the former decree of that court to be reversed. It also correctly denied petitioner's "Petition to Delimit Territory," and correctly refused to undertake hearings on the subject, since the Court of Appeals itself had declined to order such delimitation. Likewise, it correctly denied petitioner's application for leave to file a supplemental bill of complaint, inasmuch as a similar application had been denied by the Court of Appeals.

In all of these rulings, the District Court simply adhered to the rule of law above stated. It did, however, at the suggestion of respondent (R. 204a), specify in its judgment dismissing the complaint and suit (R. 103a) that the judgment was "intended to adjudicate neither the use of 'Budweiser' or 'Bud' after April 20, 1940, nor sales, nor use of the name 'Du Bois Budweiser,' nor distribution outside of the localized areas of production and distribution of the product of defendant as defined by such sales, use and distribution,"—a provision which carefully and adequately protects whatever rights petitioner might have if respondent hereafter should wrongfully expand the area of its sales.

5. *Similarly, the second decision by the Court of Appeals simply carried into effect its original decision.*

In its second decision, the Court of Appeals ruled that the District Court, in dismissing the complaint without undertaking to define the limits of respondent's sales area or to receive testimony as to alleged sales beyond such area after April 20, 1940, had rightly interpreted its mandate and correctly disposed of the case. The reason for this ruling is obvious. When the Court of Appeals refused petitioner's requests for reargument and for leave to file a supplemental complaint, such refusals constituted definite rulings that the questions of "localized territory" and attempted enlargement thereof should *not* be settled in this case. That ruling then became the law of the case.[4] As such, it governed the action of the District Court after mandate, for "When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court:" *Insurance Group Committee v. Denver & R. G. W. R. Co.,* 329 U. S. 607, 612.

This same principle of the law of the case impelled the action of the Court of Appeals on the second appeal, for a second appeal cannot be made a means to obtain

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[4] "In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson,* 225 U. S. 436, 443, 444.

a reconsideration of a case by the appellate court, in the absence of any new facts.[5]

Thus, since the District Court had properly applied and followed the mandate, the Court of Appeals was clearly justified in affirming the judgment presented for its review on the second appeal, and in refusing to permit petitioner to relitigate questions which the court had previously considered and decided. In so deciding, the Court of Appeals, as was its right, merely adhered to the law of the case which it had earlier established, and simply enforced its own original decision.

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[5] In *A. S. Kreider Co. v. United States,* 117 F. 2d 133 (C.A. 3, 1940) the defendant attempted, on a second appeal, to raise for decision questions decided by the court on an earlier appeal by the plaintiff in the same case. It was held that such a reconsideration should be forbidden, the court saying (p. 135):—"The former decision of this court became the law of the case and, once the law of a case is settled by an appellate court, it is settled for that tribunal as well as for the trial court, save for new or different facts. Toucey v. New York Life Insurance Co., 8 Cir., 112 F. 2d 927, 928. To reverse the court below, in a wholly unchanged factual situation, for doing what this court directed should be done would, to say the least, be a positive disservice to the orderly administration of justice. *A second appeal may not be used to raise questions in the same case already put at rest by the same court upon a prior appeal. Toucey v. New York Life Insurance Co., supra.*" (Emphasis supplied.) In *Roberts v. Cooper,* 61 U. S. 467, Mr. Justice Grier said (p. 481):—"To allow a second writ of error or appeal to a court of last resort on the same questions which were opened to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members."

6. *Under the doctrine of "the law of the case," petitioner cannot, with propriety, advance the same questions for a second time in this second petition for certiorari.*

As previously pointed out (p. 25, ante), petitioner's instant petition for certiorari embodies the identical questions which, *inter alia,* it presented to this Court in its first application for certiorari. Save for the entry of final judgment in accordance with the first decision of the Court of Appeals,—a decision which this Court for good reasons had declined to review,—there has been no change in the fact-situation of the parties since the case was here on the earlier occasion.

Neither before Judge Fee in the hearings upon the mandate, nor in the Court of Appeals at the time of the second appeal, nor in its present petition for certiorari, has petitioner complained of any act or course of conduct on the part of respondent occurring since issuance of the mandate by the Court of Appeals. Indeed, since its petitions in the Court of Appeals were denied on July 27, 1949, there has been no claim by petitioner of any new sales of Du Bois Budweiser beer by respondent at any point outside the so-called "localized area," or of any new and further expansion of, or threat to expand, its sales-territory beyond that of April 20, 1940. Petitioner's charges on these subjects have not been changed from those recited in its first petition for certiorari.

In this situation it is scarcely proper for petitioner to again ask this Court to review the case. It shows a disregard for the time of the Court. No question of public concern or of conflicting decisions is involved. Since there must be an end to litigation, to permit peti-

tioner to again come into this Court on the identical factual situation and questions of law which it presented previously would, in the words of Mr. Justice Grier in *Roberts v. Cooper, supra,* "lead to endless litigation."

The law of the case was settled for all purposes by the first decision of the Court of Appeals. There has been no departure from it in the subsequent decision of either of the courts below, and nowhere in the present petition is there a suggestion to the contrary. Thus, the present petition is merely a repetition of petitioner's previous effort to have such law of the case held to be erroneous. Since there has been no change of circumstances (and also because the law of the case was properly determined, as we shall demonstrate in the succeeding section of this brief), there can be no sound reason to permit petitioner to argue the matter a second time. As was said in *Insurance Group Committee v. Denver & R. G. W. R. Co., supra* (329 U. S. 607, 612):—

> "While power rests in a federal court that passes an order or decision to change its position on a subsequent review in the same cause, *orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review.*" (Emphasis supplied.)

We fully appreciate the admonitions of this Court that in no case shall its denial of certiorari be interpreted as an affirmance of the decision of the subordinate court presented for review. Nevertheless, as this Court has said, the writ of certiorari is an extraordinary one, to be exercised sparingly and only in cases of peculiar

gravity and general importance, or in order to secure uniformity of decision: *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251, 258. It seems permissible, therefore, to point out that the instant case is of no concern to the public, but only to the parties, and that it involves no conflict with opinions in other circuits. Nor is it a case of especial gravity, inasmuch as the decree expressly provides that it is not *res adjudicata* as to matters occurring in new territories after April 20, 1940, and thereby carefully preserves to petitioner the right to complain in a new action or actions if, thereafter, its rights should be infringed by respondent.

II.

In Any Event, the Decision of the Court of Appeals Was Correct in Law, and in No Sense a Departure From the Accepted and Usual Course of Judicial Proceedings.

1. *Petitioner had no cause of action at the time it commenced this suit.*

It is clear beyond dispute that petitioner had no enforceable cause of action on April 20, 1940, when it instituted this suit. Petitioner's present arguments all concede—since as a practical matter no other course is possible to it at this juncture—that, under the first decision of the Court of Appeals, petitioner was estopped to complain or have relief against respondent's continued sale of "Du Bois Budweiser Beer" in the territories where it was known and offered for sale on April 20, 1940. If that concession were not made, expressly or by implication, petitioner's insistence that the territories

in question be defined now would, of course, lack any point.

This unavoidable concession means, however, that on April 20, 1940, sales of the respondent's "Du Bois Budweiser Beer" had given petitioner no right of action whatever, and that if, as the courts below have held (R. 102a, 85a), the decision of the case must be based on the facts existing on that date, a final judgment dismissing the complaint was inevitable.

2. *No evidence was offered which could support petitioner's original allegation in the complaint that respondent had threatened to extend the territory in which "Du Bois Budweiser Beer" was sold on or before April 20, 1940.*

Recognizing the difficulty in which it finds itself by the necessary concession contained in its demand for a delimitation of respondent's "localized territory," petitioner now contends, at pages 8, 19 and 20 of its present brief, just as it did in its first petition for certiorari, that it had a cause of action because *its complaint had alleged* that respondent had on April 20, 1940, *threatened* to expand its territory. This contention can serve no purpose, however, because the averment to which it refers,—an averment made "on information and belief" in paragraph 34 of the complaint (R. 14a),—was denied by the answer (R. 39a), and was not supported by any proof whatever at the trial.[6] There was not an iota of

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[6] The only instances which petitioner cites of threats by respondent, *on April 20, 1940, when the complaint was filed,* to extend its sales-territory as alleged in paragraph 34 of the complaint, will be found in foot-

proof that on April 20, 1940 respondent was attempting to procure outlets for its product in any new place or places, and petitioner points to none. Facts in issue are, of course, not established by averments in pleadings, unless and until the averments are proved by adequate evidence.

3. *Petitioner's assertions that respondent has extended and threatened to extend its territory since the complaint was filed are not supported by evidence.*

Petitioner further says, at page 21 of its brief, that in 1940, following the filing of the complaint, respondent sold its beer in Harrisburg, Pa., and Rochester, N. Y., established a new distributorship in West Chester, Pa., and tried to establish a distributorship in Binghamton, N. Y. These things, it says, evidence respondent's threats to expand into territories where it "had no established good-will in 'Du Bois Budweiser' on April 20, 1940."

This argument is a grasping at straws. There is, in this record, uncontradicted proof that respondent had

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notes A and B on page 21 of its present petition. It is there related that *after 1937* respondent extended its sales to Williamsport, in Lycoming County, Pennsylvania, and *in 1939* began to sell in Dornsife, Herndon, Rebuck and Shamokin, Pennsylvania (all classified as towns within a few miles of Williamsport). Petitioner had never mentioned, at any earlier stage of the case, the matter of these sales. However, since all of the places named had become a part of respondent's sales territory *long prior to April 20, 1940,* manifestly the sales in those places did not constitute a threat of extension of territory *on that date.*

sold its "Du Bois Budweiser Beer" in Rochester, N. Y., for a number of years before Prohibition and had there established a good will for its product, and that in 1940 it was merely resuming a former sales-territory (Table I to this brief (31c), where the names of the witnesses and the page references to their testimony are shown). As to Harrisburg, Pa., the undenied proof is that respondent began to sell its Du Bois Budweiser beer in that place in 1939 (see Table I, pp. 7c, 8c); as a consequence, Harrisburg was a part of respondent's localized area before petitioner sued, and sales in that place after suit brought patently were not by way of expansion of, or threat to expand, sales-territory.

As to West Chester, Pa., a town in the Philadelphia area, the evidence showed that respondent's "Du Bois Budweiser Beer" had been sold in Philadelphia for many years and up until the advent of Prohibition (Table I, p. 12c). Reentry into that area after Repeal was plainly not an entrance into new fields where respondent's beer had not been known theretofore.

With respect to both West Chester, Pa., and Binghamton, N. Y., there are some facts which may deserve to be retold here. It is true that at about the time the complaint was filed, one Nathan Michel, a beer distributor of West Chester, appeared at respondent's brewery, introduced himself, and purchased a quantity of Du Bois Budweiser beer at wholesale prices for distribution in Chester County, Pennsylvania. A few months later he abandoned his business and disappeared suddenly. Several years later he reappeared, just as suddenly, as a witness for petitioner at a session of depositions in New York City, at which he was accompanied by two old

friends, who, although otherwise disreputable,[7] exhibited a warm and steadfast loyalty to petitioner Anheuser-Busch, Inc. It is true also that, during the same session of depositions, one Clarence J. Cook, a wholesale grocer in Binghamton, testified that during the summer of 1940 he determined (without any solicitation by respondent) to buy a quantity of Du Bois Budweiser beer for resale in Binghamton, placed his order at the brewery in Du Bois, reported his conversation at once to an agent of the petitioner Anheuser-Busch, Inc., and then on the very next day cancelled the order, dropping forever any plan to sell respondent's beer (see R. 311-316).

Passing over the strong suggestion that the testimony of Michel and Cook described incidents carefully planned by petitioner,[8] this testimony does not, of course, prove petitioner's averment that respondent had "threatened," weeks or months before, to sell its beer in new territories, and so does not prove, support or justify the averment of "threats" to extend respondent's sales-territory, made in paragraph 34 of the

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[7] See the testimony of the witnesses Horace R. Conner (R. 316), George J. Brinton (R. 320), George E. McCloskey (R. 341), Albert K. Ramsey (R. 345), C. Gilbert Hazlett (R. 347) and George W. Klenk (R. 349).

[8] The peculiarity of this testimony may be explained, if it be considered together with that of petitioner's witness Stewart E. Lyke, printed at R. 351-358. Late in 1938, Mr. Lyke went to Du Bois, falsely represented himself to be a beer distributor, and had a conversation with one of respondent's officers, similar to those described by Mr. Cook and by Mr. Michel and his friends. It was conceded, however, that Mr. Lyke acted in the matter under the instructions of petitioner, and as a sort of undercover agent provocateur for the latter.

complaint of April 20, 1940. Instead, as a reading will show, the depositions of Cook and Michel, and of the latter's friends, were offered at the trial, not to prove any such "threat," but in the course of petitioner's unsuccessful effort to prove that respondent's sales practices had been unfair and deceptive.

And if, as is the case, this testimony does not support the averment of threats, it has no value to establish the contention that petitioner had a cause of action on April 20, 1940, for in that event it has, at best, the same character as that of the affidavits attached to the petition of June 28, 1949, which prayed leave of the Court of Appeals to file a supplemental bill of complaint (R. 411). It is testimony tending, at best,[9] to prove that petitioner acquired a cause of action *after*, but not *before* its complaint was filed.

4. *Absent a cause of action on April 20, 1940, subsequent threats by respondent to expand its sales-territory will not sustain the original complaint, but must be complained of in a new suit.*

If petitioner's evidence of sales at West Chester and Binghamton were given its maximum value, and treated as a showing that respondent began to sell "Du Bois

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[9] A study of the Table attached to this brief will show that, in fact, both Chester County, Pennsylvania, and Binghamton, New York, were beyond any serious doubt places in which respondent's beer must have been known long before the complaint was filed, and will, accordingly, suggest that petitioner has made the most of respondent's dealings with Cook and Michel, in its argument here, simply because it has nothing better.

Budweiser Beer" outside its "localized territory" *after* the complaint was filed, then there would arise the question whether such subsequent sales—even though they were wrongful—would correct petitioner's lack of a cause of action at the time its complaint was filed.

At the hearings on the mandate, Judge Fee in the District Court held that they would not correct the defect, and that if petitioner had no cause of action when it filed its complaint, no judgment could be based upon a cause of action thereafter acquired (R. 200a). This ruling was a correct one, for the law on the subject is firmly settled: *Hollingsworth v. Flint,* 101 U. S. 591; *United States ex rel. Texas P. Cement Co. v. McCord,* 233 U. S. 157; *Kryptok Co. v. Haussmann & Co.,* 216 Fed. 267 (E. D. Pa., 1914); *Eveland v. Detroit Machine Tool Co.,* 18 F. 2d 968 (E. D. Mich., 1927); *Chapman v. Griffith-Consumers Co.,* 107 F. 2d 263 (App. D. C., 1939).

In *American Bonding & Trust Co. v. Gibson County,* 145 Fed. 871 (C.A. 6), Judge Lurton, speaking for the court, said (p. 874):—

> "Plaintiff's right to any recovery depended upon its right at the inception of the suit, and the non-existence of a cause of action when the suit was started is a fatal defect, which cannot be cured by the accrual of a cause pending suit."

In the *McCord* case, *supra* (233 U. S. 157), in which refusal to allow an amendment covering happenings after suit filed was approved, this Court said (p. 164):—

> "* * * it is elementary that an amendment dates back to the filing of the petition, and is to supply defects in the cause of action then existing, or at

most to bring into the suit grounds of action which existed at the beginning of the case. *In this case there was no cause of action to amend.*" (Emphasis supplied.)

And in *Texarkana v. Arkansas Louisiana Gas Co.*, 306 U. S. 188, 203, Mr. Justice Reed stated the converse of the rule in this language: "* * * *Where there is a good cause of action stated in the original bill,* a supplemental bill setting up facts subsequently occurring which justify other or further relief is proper." (Emphasis supplied.)

We respectfully submit, therefore, that since petitioner failed to establish a wrongful use by respondent of the word "Budweiser" within its "localized territory," and was equally remiss in failing to prove that on April 20, 1940 respondent was attempting "to establish new agencies in places where (its) goods have never been sold before," it had no cause of action when suit was filed; that it could not breathe life into a dead suit by proof of facts occurring after April 20, 1940; and that later happenings, if in violation of petitioner's rights, must be complained of in a new suit. When the Court of Appeals denied petitioner's request for leave to file a supplemental bill, complaining of alleged conduct of respondent in 1949, it stated that such matters could properly be determined by the filing of a new bill of complaint (R. 92a). This was in strict accord with the applicable principle of law.

5. *The judgment of the court below involved no departure from the ordinary and accepted course of judicial procedure.*

It has been observed already that, lacking any other conceivable ground which could justly attract the attention of this Court, the present petition for certiorari is based upon a charge that the judgment of the court below, in its refusal to reopen the case for a trial of the "localized territory" question, has departed from the ordinary and accepted course of judicial procedure, to such a degree as to deny justice to petitioner.

Stated another way, this contention is that, under the accepted course of judicial procedure, the court below was *bound,* in response to petitioner's eleventh-hour request, to determine the "localized territory" issue—an issue on which petitioner had seen fit to offer no evidence during the long trial, and one which could have no ultimate legal significance unless and until the courts shall have decided the at least equally important questions whether petitioner has any monopoly in the word "Budweiser," and to what extent it should be permitted to prevent respondent's use of the name "Du Bois Budweiser Beer" outside the "localized territory." The contention is that the court was *bound* to define the "localized territory," even though there was no showing that respondent had made or threatened any sale of its beer outside the territory, or committed any other wrong or alleged wrong at the time the suit was commenced. The contention is, finally, that the failure of the court to define the localized territory, in this very case, was such a denial of justice as to command the intervention of this Court.

The unsoundness of this contention appears upon any plain statement of its terms; for in the ordinary and accepted course of judicial procedure, a plaintiff who has proved no injury, nor even any threat of injury, is not entitled either to such declaratory relief as is sought here or to relief of any other kind; and a defendant who has neither committed nor threatened any wrong cannot be embroiled in the burdens of probably needless and certainly expensive litigation. In the ordinary and accepted course of legal procedure, a plaintiff who has, after an unexcused delay of thirty-five years, brought an action solely to enforce an alleged trade-mark, and who has failed in that object, is not denied justice by a judgment which requires him to litigate—and which carefully preserves his right to litigate—other questions in other actions, if he chooses to commence them.

This unsound character of petitioner's theory is emphasized here by the failure of the petition to cite a single instance in which this Court has granted certiorari in any case which bears any relevant similarity to this case. Of all the long list of decisions set out in the petition, none has any real point here.

Thus, several of petitioner's citations are cases in which the judgments under review had granted or denied relief arbitrarily, and entered final decisions which were clearly or probably wrong. Among these are *Lawrence v. St. Louis-San Francisco Ry. Co.*, 274 U.S. 588 (1927) and *Virginian R. Co. v. United States*, 272 U.S. 658 (1926) and *Twist v. Prairie Oil & Gas Co.*, 274 U.S. 684 (1927). These cases are inapposite here, because in this case there has been no arbitrary action, and no final judgment of the "localized territory" question,—it is open to further investigation, in another action, if

respondent shall ever violate the alleged territorial boundaries.

A number of the cases cited in the petition dealt with what are today at least familiar principles of appellate practice. In this class is *Brown v. Fletcher,* 237 U.S. 583 (1915). The lower court had, without investigating the substantive issues of fact, dismissed an action for want of jurisdiction. On appeal, it was this Court's conclusion that jurisdiction had existed, and that accordingly the decision below had been wrong. Therefore, the judgment was reversed, and the court below directed to try the substantive issues in the regular way. *Martino v. Michigan Window Cleaning Co.,* 327 U.S. 173 (1946); *Minnesota v. National Tea Co.,* 309 U.S. 551 (1940); *Gerdes v. Lustgarten,* 266 U.S. 321 (1924); and *Schwartz v. Mills,* 20 U.S. Law Week 2206 (C.A. 2, 1951) are all similar to *Brown v. Fletcher,* in every now material respect. These cases have no bearing here, because none of them presented any question of the grant or denial of justice.

Almost all of the other cases cited by petitioner presented questions of the scope of federal court jurisdiction, either under special statutes or under the diversity statute. Thus, in *Porter v. Warner Holding Co.,* 328 U.S. 395 (1946) and *Porter v. Lee,* 328 U.S. 246 (1946), it was held that in equity actions by the administrator under the federal rent control statute to prevent collection of excessive rents, the court has power, by injunction, to order the return of past excessive collections. In *Alexander v. Hillman,* 296 U.S. 222 (1935), the Court held that a receivership court has jurisdiction *in personam* over creditors who file claims, and therefore the power to adjudicate the receiver's counterclaims

against such creditors. In *Just v. Chambers*, 312 U.S. 383 (1941) and *Hartford Acci. & Indemnity Co. v. Southern P. Co.*, 273 U.S. 207 (1927), the Court held that in actions *in rem* in admiralty, the District Court has the power (which it must exercise as a practical matter) to value or adjudicate all claims presented, whether strictly *in rem* as to the vessel or not.

Similarly, in *Meredith v. Winter Haven*, 320 U.S. 228 (1943) and *Spiegel's Estate v. Commissioner*, 335 U.S. 701 (1949), it was held that where a federal court has power in other respects to determine a case, it should not deny its jurisdiction simply because new and difficult questions of state law are presented. In *Camp v. Boyd*, 229 U.S. 530 (1913), it was held that a federal court of equity has power to quiet title to land even though the disputed title to part of the land is a legal, rather than an equitable, title. In *Kinney Coastal Oil Co. v. Kieffer*, 277 U.S. 488 (1928), it was held that, under the federal oil and gas lease statute of 1914, the District Court had power, without calling a jury, to assess damages which a grantee of the surface claimed had resulted from drilling operations. In *Liberty Oil Co. v. Condon National Bank*, 260 U.S. 235 (1922), it was held that an answer in an action at law can initiate an equity interpleader which the District Court has power to decide as a court of equity. And in *Williams v. Green Bay & W. R. Co.*, 326 U.S. 549 (1946), it was held that a District Court in New York had the power to decide, over a plea of *forum non conveniens*, an action between a citizen of that state and a railroad company operating in Michigan.

Some of these decisions have no imaginable relationship to the case now at bar. The others would be

relevant only if the court below had, without deciding the "localized territory" question, entered a judgment deciding that question finally against petitioner, or in some other way forbidding its adjudication in a federal court. Of course the court below took no such action. Instead, its judgment, without making any decision of the territorial question, carefully preserves petitioner's right to litigate the question hereafter when—and if—it can be shown that respondent is expanding its business into any new territory, in any wrongful way.

The other three cases in petitioner's long table on this point are decisions which *oppose,* instead of support, its contentions in this case. In *Hecht Company v. Bowles,* 321 U.S. 321 (1944), this Court made it clear that a court of equity is not legally required to exhaust its powers in every judgment,—that it should, instead, exercise its discretion to deny relief, which it has the power to grant, where that course appears to be just. *Letulle v. Scofield,* 308 U.S. 415 (1940) and *Lutcher & Moore Lumber Co. v. Knight,* 217 U.S. 257 (1910), hold that a federal appellate court *cannot* decide an issue which (like the territorial question presented here) has not been raised at the proper time and heard in the regular way.

None of these authorities, in short, can support petitioner's prayer for a review of the case by this Court. No other authority could possibly support it, for the judgment of the court below was, in every aspect, a regular and proper disposition of the case, and one which neither denied justice to petitioner nor wronged nor injured it in any other way.

Conclusion.

The petition for certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.

TABLE I.

Testimony Showing Places Where Du Bois Budweiser Has Been Sold

1. TESTIMONY BY DEPOSITION

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
		Pennsylvania		
Throughout Adams County	1940	Reigart	Harrisburg, Pa. June 30, 1944	177
Altoona	1942-1944	Boyle	Altoona, Pa. June 29, 1944	3
	1933-1944	Radlsbeck	Altoona, Pa. June 29, 1944	26
	1938-1944	Radlsbeck	Altoona, Pa. June 29, 1944	51
	1933-1944	Schimminger	Altoona, Pa. June 29, 1944	114
	Before 1919 1933-1944	Stump	Altoona, Pa. June 29, 1944	121

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
	1933-1944	Stewart	Altoona, Pa. June 29, 1944	127
	Before 1919	Sylvus	Avis, Pa. Dec. 8, 1944	55
	Before 1919	Port	Tyrone, Pa. May 1, 1946	83
Avis	Before 1919	Sylvus	Avis, Pa. Dec. 8, 1944	55
	Before 1919	Wolfe	Avis, Pa. Dec. 8, 1944	T. 14940
Bakerstown	1933-1934	Blum	Altoona, Pa. June 29, 1944	101
Bellefonte	Before 1919	Port	Tyrone, Pa. May 1, 1946	83
	1908-1917	W. T. Stine	State College, Pa. Dec. 11, 1946	T. 16530
	1939-1946	Tanney	State College, Pa. Dec. 11, 1946	T. 16540

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
	1905-1918	Daggett	State College, Pa. Dec. 11, 1946	T. 16581
	1933-1946	A. M. Stine	State College, Pa. Dec. 11, 1946	102
	1905-1918	Rhoads	Bellefonte, Pa. Dec. 11, 1946	T. 16627
	1933-1946	Keefer	Sunbury, Pa. Dec. 12, 1946	T. 16700
	1905-1906 1933-1946	Bilger	State College, Pa. Dec. 11, 1946	T. 16513
Bradford	Before 1919	L. G. Meehan	Olean, N. Y. March 16, 1944	225
	1910-1917	Ronan	Buffalo, N. Y. July 19, 1946	T. 16119
	1912-1917 1936-1946	Corignani	Bradford, Pa. Nov. 1, 1946	T. 16421
	Before 1919 1933-1946	De Palma	Bradford, Pa. Nov. 1, 1946	285

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
Bridgeport	1911-1912	Gear	Bridgeport, Pa. Dec. 6, 1943	T. 14163
	1911-1912	Cannon	Bridgeport, Pa. Dec. 6, 1943	T. 14173
	1910-1912	McKernan	Norristown, Pa. Dec. 6, 1943	T. 14178
	1912-1918	Gartin	Norristown, Pa. Dec. 6, 1943	T. 14190
Brookville	1913-1944	Haines	Williamsport, Pa. Dec. 7, 1944	T. 14884
Throughout Cambria County	1909-1919		Altoona, Pa. June 29, 1944	59
	1933-1944	Shettig	Altoona, Pa. June 29, 1944	86
	1907-1919		Altoona, Pa. June 29, 1944	101
	1933-1944	Maguire	Williamsport, Pa. Dec. 7, 1944	T. 14864
Carrolltown	1933-1944	Blum	Bradford, Pa. Nov. 1, 1946	285
Central Pa. (Generally)	1907-1917	Lindheimer	Altoona, Pa. June 29, 1944	191
	1940	De Palma		
Chest Springs	1933-1944	Blum		

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
Clarion	1913-1944	Haines	Williamsport, Pa. Dec. 7, 1944	T. 14884
Clearfield	1905-1919	Binder	Renovo, Pa. July 9, 1945	3
	Before 1919	Port	Tyrone, Pa. May 1, 1946	83
Coleton	Before 1919	Conevery	Wellsboro, Pa. July 11, 1945	221
Coudersport	Before 1919			
	Since repeal	Conevery	Wellsboro, Pa. July 11, 1945	221
Covington	1933-1944	Bantley	Corning, N. Y. March 13, 1944	T. 14332
	1910-1919	Raymond	Mt. Jewett, Pa. July 12, 1945	T. 15375
	Before 1919	Stambaugh	Olean, N. Y. March 16, 1944	T. 14485
Throughout Cumberland County	1940	Reigart	Harrisburg, Pa. June 30, 1944	177

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
Throughout Dauphin County	1940	Reigart	Harrisburg, Pa. June 30, 1944	177
Driftwood	Before 1919	W. MacDonald	Emporium, Pa. July 10, 1945	T. 15269
Du Bois	1907-1919	Wurster	New York, N. Y. Sept. 3, 1942	445
	1906-1908	Baumeister	Erie, Pa. Feb. 7, 1944	T. 14291
	Before 1919	Stambaugh	Olean, N. Y. March 16, 1944	T. 14485
	1910-1919	C. Miller	Wellsboro, Pa. July 11, 1945	T. 15297
	1905	Beilein	Buffalo, N. Y. July 15, 1946	T. 15849
	1910-1912		Conneaut, Ohio	
	1915-1922	Tyger	Nov. 19, 1946	T. 16486
Ebensburg	1933-1944	Blum	Altoona, Pa. June 29, 1944	101
Elred	Before 1919	Stambaugh	Olean, N. Y. March 16, 1944	T. 14485

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
Emporium	Before 1919	MacDonald	Emporium, Pa. July 10, 1945	T. 15269
Erie	1915-1919	Seus	Erie, Pa. Feb. 7, 1944	T. 14263
	1905	Sherry	Erie, Pa. Feb. 7, 1944	43
Throughout Fayette County	1905-1919	Griffin	Buffalo, N. Y. July 16, 1945	T. 15804
	Before 1919	Cromwell	Sunbury, Pa. Dec. 12, 1946	T. 16661
Franklin	1910	Marsters	Kane, Pa. July 13, 1945	T. 15409
Galeton	Before 1919	Stambaugh	Olean, N. Y. March 16, 1944	T. 14485
Harrisburg	1939-1941	Barrick	Harrisburg, Pa. June 30, 1944	141
	1939-1940	D. Diamond	Harrisburg, Pa. June 30, 1944	170

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
	1939-1940	P. Diamond	Harrisburg, Pa. June 30, 1944	196
Hazleton	1909-1910	Brislin	Hazleton, Pa. March 9, 1945	T. 15020
	1908-1910	Daugherty	Hazleton, Pa. March 9, 1945	T. 15032
Hicks Run	1913-1919	Lucas	Sinnemahoning, Pa. July 10, 1945	T. 15244
Huntington	1910-1913	O'Mara	Huntington, Pa. May 1, 1946	36
Johnsonburg	1910-1919	Meehan	Olean, N. Y. March 16, 1944	225
	1913-1944	Haines	Williamsport, Pa. Dec. 7, 1944	T. 14884
Johnstown	1916	Flannelly	Scranton, Pa. Dec. 4, 1944	T. 14657
	1912-1916	Shields	Johnstown, Pa. May 2, 1946	12

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
	Before 1919	Cunningham	Johnstown, Pa. May 2, 1946	35
	1914-1919 1933-1946	Zimmerman	Johnstown, Pa. May 2, 1946	22
	Before 1919	Hornick	Johnstown, Pa. May 2, 1946	18
	1908-1946	Decker	Johnstown, Pa. May 2, 1946	29
Kane	1913-1944	Haines	Williamsport, Pa. Dec. 7, 1944	T. 14884
	1910-1919	Miller	Wellsboro, Pa. July 11, 1945	T. 15297
	1905-1919 1935-1945	Crossmire	Kane, Pa. July 13, 1945	T. 15392
	1910-1919 1933-1945	Marsters	Kane, Pa. July 13, 1945	T. 15409
	1915-1945	Crosson	Kane, Pa. July 13, 1945	T. 15432

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
Throughout Lackawanna Valley	Before 1919	Loftus	Scranton, Pa. Dec. 5, 1944	T. 14802
Lansford	1916-1917	Dorrian	Lansford, Pa. March 8, 1945	T. 15015
Larksville	1912-1917	Blaine	Larksville, Pa. March 9, 1945	T. 15072
Lock Haven	1913-1944	Sweitzer	Mill Hall, Pa. Dec. 8, 1944	T. 14909
	1915-1944	Blevins	Lock Haven, Pa. Dec. 8, 1944	T. 14917
	1917-1919	Sterner	Lock Haven, Pa. Dec. 8, 1944	T. 14925
	Before 1919	Farnsworth	Lock Haven, Pa. Dec. 8, 1944	T. 14928
	1915-1944	McNerney	Lock Haven, Pa. Dec. 8, 1944	T. 14931
Loretto	1933-1944	Blum	Altoona, Pa. June 29, 1944	

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
Throughout McKean County	1939-1945	McCaigue	Coudersport, Pa. July 12, 1945	T. 15316
Milesburg	1906-1918			
	1933-1946	Kohlbecker	State College, Pa. Dec. 11, 1946	T. 16550
Mill Hall	1913-1944	Sweitzer	Mill Hall, Pa. Dec. 8, 1944	T. 14909
Mt. Jewett	1910-1919	C. Miller	Wellsboro, Pa. July 11, 1945	T. 15397
	1910-1945	Raymond	Mt. Jewett, Pa. July 12, 1945	T. 15375
	1938-1945	Beere	Mt. Jewett, Pa. July 12, 1945	349
	1910-1919	Gustafson	Mt. Jewett, Pa. July 12, 1945	T. 15385
Norristown	1912-1918	Gartin	Norristown, Pa. Dec. 6, 1943	T. 14190
	1912-1918	McKernan	Norristown, Pa. Dec. 6, 1943	T. 14178

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
Northwest Pa.				
Generally	1905-1945	Crosson	Kane, Pa.	
			July 13, 1945	T. 15432
Oil City	1913-1944	Haines	Williamsport, Pa.	
			Dec. 7, 1944	T. 14884
Throughout			Jamestown, N. Y.	
Pennsylvania	1906-1918	Carlson	Jan. 17, 1947	T. 16745
Philadelphia	Before		Norristown, Pa.	
	1919	McKernan	Dec. 6, 1943	T. 14178
	1915-1917	Crosson	Kane, Pa.	
			July 13, 1945	T. 15432
		Carlson	Jamestown, N. Y.	
			Jan. 17, 1947	T. 16745
	1914-1919	J. H. Newell	Pottsville, Pa.	
			March 7, 1945	154
Philipsburg	1905-1944	Blevins	Lock Haven, Pa.	
			Dec. 8, 1944	T. 14917
Phoenixville	1911-1919	Hackett	Phoenixville, Pa.	
			March 7, 1945	T. 14953

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
	1910-1919	Hartman	Phoenixville, Pa. March 7, 1945	T. 14962
	1911-1919	Schlick	Phoenixville, Pa. March 7, 1945	T. 14974
Pittsburgh	1913-1944	Haines	Williamsport, Pa. Dec. 7, 1944	T. 14884
	1910	Girard	Buffalo, N. Y. July 19, 1946	T. 16048
Plymouth	1915-1920	F. A. Bachinger	Bloomsburg, Pa. Dec. 6, 1944	T. 14854
	1916-1917	Mergo	Plymouth, Pa. March 9, 1945	T. 15083
	1915-1918	J. F. Bachinger	Wilkes-Barre, Pa. March 9, 1945	T. 15089
Port Matilda	1933-1946	W. T. Stine	State College, Pa. Dec. 11, 1946	T. 16530
Pottsville	Before 1919	Koertzel	Pottsville, Pa. March 8, 1945	T. 14984

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
	1909-1914	J. H. Newell	Pottsville, Pa. March 7, 1945	154
	1912-1916	G. E. Kline	Pottsville, Pa. March 8, 1945	T. 15001
Throughout Potter County	1939-1945	McCaigue	Coudersport, Pa. July 12, 1945	T. 15316
Punxsutawney	1913-1944	Haines	Williamsport, Pa. Dec. 7, 1944	T. 14884
Renovo	Since repeal	Keefer	Sunbury, Pa. Dec. 12, 1946	T. 16700
	1945	Reifsnyder	Renovo, Pa. July 9, 1945	22
	Before 1919		Renovo, Pa.	
	1940-1945	Welsh	July 9, 1945	66
	1933-1944	Ryan	Renovo, Pa. July 9, 1945	T. 15221

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
	1943-1945	G. Koehler	Renovo, Pa. July 9, 1945	T. 15232
	1905-1945	Binder	Renovo, Pa. July 9, 1945	3
Reynoldsville	1913-1944	Haines	Williamsport, Pa. Dec. 7, 1944	T. 14884
Ridgeway	1908	Marsters	Kane, Pa. July 13, 1945	T. 15409
Roulette	1936-1937	B. Stambaugh	Olean, N. Y. March 16, 1944	T. 14488
Scranton	1914-1919	Stahl	Scranton, Pa. Dec. 4, 1944	T. 14616
	1914-1917	Tisi	Scranton, Pa. Dec. 4, 1944	T. 14645
	1914-1918	Flannelly	Scranton, Pa. Dec. 4, 1944	T. 14657
	1915-1919	Ridgeway	Scranton, Pa. Dec. 4, 1944	T. 14668

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
	1914-1919	O'Malley	Scranton, Pa. Dec. 4, 1944	T. 14680
	1913-1919	F. E. Jones	Scranton, Pa. Dec. 4, 1944	T. 14696
	1913-1919	Riker	Scranton, Pa. Dec. 4, 1944	T. 14715
	1914-1919	Kerekes	Scranton, Pa. Dec. 4, 1944	T. 14727
	1915-1919	Conrad	Scranton, Pa. Dec. 5, 1944	T. 14743
	1913-1919	Williams	Scranton, Pa. Dec. 5, 1944	T. 14768
	1933-1944	McCormick	Scranton, Pa. Dec. 5, 1944	T. 14782
	1914-1919	Noll	Scranton, Pa. Dec. 5, 1944	T. 14814
	1913-1919	Bohr	Sunbury, Pa. Dec. 12, 1946	T. 16641

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
Sinnemahoning	1913-1919	Lucas	Sinnemahoning, Pa. July 10, 1945	T. 15244
	1909-1919	Bailey	Sinnemahoning, Pa. July 10, 1945	T. 15256
Smethport	1910-1919	C. Miller	Wellsboro, Pa. July 11, 1945	T. 15297
	1905-1910	Raymond	Mt. Jewett, Pa. July 12, 1945	T. 15375
	Before 1919	Stambaugh	Olean, N. Y. March 16, 1944	T. 14485
Somerset County	Before 1919	Cromwell	Sunbury, Pa. Dec. 12, 1946	T. 16661
State College	Since repeal	A. M. Stine	State College Dec. 11, 1946	102
	Since repeal	Keefer	Sunbury Dec. 12, 1946	T. 16700

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St. Mary's	Since repeal	Meehan	Olean, N. Y. March 16, 1944	225
	1913-1944	Haines	Williamsport, Pa. Dec. 7, 1944	T. 14884
Sunbury	1912-1918	Sholley	Sunbury, Pa. Dec. 12, 1946	T. 16686
	Before 1914-1916	Keefer	Sunbury, Pa. Dec. 12, 1946	T. 16700
Titusville	1910-1918	Koepjan	Olean, N. Y. March 16, 1944	251
Tyrone	1912-1919		Tyrone, Pa.	
	1933-1946	Troutwine	May 1, 1946 Tyrone, Pa.	T. 15602
	Before 1919	Port	May 1, 1946 Tyrone, Pa.	83
	1911-1918			
	1933-1946	H. W. Waple	May 2, 1946	2
	Some years before 1919			
	1933-1946	C. G. Waple	Tyrone, Pa. May 2, 1946	8

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
Union City	1933-1944	Koepjan	Olean, N. Y. March 16, 1944	251
Uniontown	1933-1944	Koepjan	Olean, N. Y. March 16, 1944	251
Warren	1933-1947	Peterson	Warren, Pa. Jan. 16, 1947	3
	1933-1942	Healy	Warren, Pa. Jan. 16, 1947	21
	1936-1943	Druggan	Warren, Pa. Jan. 16, 1947	39
	1908-1915	Leonhart	Warren, Pa. Jan. 16, 1947	T. 16736
Wellsboro	Before 1919	Conevery	Wellsboro, Pa. July 11, 1945	221
	1916-1919	Deane	Wellsboro, Pa. July 11, 1945	T. 15288
	Before 1919	Sticklin	Wellsboro, Pa. July 11, 1945	T. 15304
	Before 1919	H. M. Robinson	Wellsboro, Pa. July 11, 1945	T. 15311

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West Williamsport	1933-1944	B. F. Johnson	Williamsport, Pa. Dec. 7, 1944	T. 14900
Wilkes-Barre	1910-1913	Price	Hazleton, Pa. March 9, 1945	T. 15042
	1905-1917	Redington	Wilkes-Barre, Pa. March 10, 1945	T. 15103
	1915-1918	J. F. Bachinger	Wilkes-Barre, Pa. March 9, 1945	T. 15089
	1909-1916	Waida	Scranton, Pa. Dec. 5, 1944	T. 14832
	1915-1920	F. A. Bachinger	Bloomsburg, Pa. Dec. 6, 1944	T. 14854
	1906-1919	McCormick	Scranton, Pa. Dec. 5, 1944	T. 14782
Throughout York County	1940	Reigart	Harrisburg, Pa. June 30, 1944	

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Williamsport	1933-1944	Newcomer	Williamsport Dec. 7, 1944	48
	1917-1919	Davies	Williamsport Dec. 7, 1944	T. 14943
		New York		
Addison	1908-1918	Bennett	Corning, N. Y. March 14, 1944	T. 14412
Buffalo	1916	Wurster	New York, N. Y. Sept. 3, 1942	445
	1910-1918	Koepjan	Olean, N. Y. March 16, 1944	251
	1905-1919	Binder	Renovo, Pa. July 9, 1945	3
	1916-1919	Beere	Mt. Jewett, Pa. July 12, 1945	349
	1912-1917	Crosson	Kane, Pa. July 13, 1945	T. 15432

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	Since repeal	F. Czerwinski	Buffalo, N. Y. July 15, 1946	T. 15703
	Since repeal	Neary	Buffalo, N. Y. July 15, 1946	T. 15674
	1910-1917	Seitz	Buffalo, N. Y. July 15, 1946	T. 15640
	1907-1919			
	Since repeal	P. A. Smith	Buffalo, N. Y. July 15, 1946	T. 15619
	1906-1919	Bullion	Buffalo, N. Y. July 16, 1946	T. 15831
	Since repeal	Schurr	Buffalo, N. Y. July 16, 1946	T. 15790
	Before 1919	Matthes	Buffalo, N. Y. July 16, 1946	T. 15768

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
	1909-1919			
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	1918-1919	Usiak	Buffalo, N. Y. July 16, 1946	T. 15878
	1914-1919	Kazmierczak	Buffalo, N. Y. July 17, 1946	T. 15870
	1909-1919	Fischer	Buffalo, N. Y. July 17, 1946	T. 15859
	1911-1912	Chudy	Buffalo, N. Y. July 18, 1946	T. 15895
	1905-1919	Dux	Buffalo, N. Y. July 18, 1946	T. 15930
	1905-1907 1913-1915			
	Since repeal	Phelan	Buffalo, N. Y. July 18, 1946	T. 15953

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	1906-1919 Since repeal	J. Czerwinski	Buffalo, N. Y. July 19, 1946	T. 15986
	Since repeal	S. Czerwinski	Buffalo, N. Y. July 19, 1946	T. 16019
	1906-1919	Girard	Buffalo, N. Y. July 19, 1946	T. 16048
	1905-1919	Rogers	Buffalo, N. Y. July 19, 1946	T. 16083
	1910-1919	Scherer	Buffalo, N. Y. July 19, 1946	T. 16100
	1916-1921	Roche	Buffalo, N. Y. July 20, 1946	T. 16165
	1937-1944	Iffiander	Buffalo, N. Y. July 20, 1946	T. 16179

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	1907		Rochester, N. Y.	
	1912-1918	Loebs	Oct. 28, 1946	3
	1912-1915	Tyger	Conneaut, Ohio Nov. 19, 1946	T. 16486
	1909-1919	Thayer	Jamestown, N. Y. Jan. 17, 1947	T. 16769
	Before 1919	Meehan	Olean, N. Y. March 16, 1944	225
	1911-1918	Torge	Salamanca, N. Y. Oct. 31, 1946	134
	1905-1919	Beilein	Buffalo, N. Y. July 15, 1946	T. 15849
	1910-1919	Marsters	Kane, Pa. July 13, 1945	T. 15409
Clyde	1911-1916	Fischette	Clyde, N. Y. Aug. 14, 1942	T. 13481

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	1907-1919	Williams	Scranton, Pa. Dec. 5, 1944	T. 14768
	1906-1919		Corning, N. Y.	
	1933-1944	Bantley	[illegible], 1944	T. 14332
	1914-1919	MacMahon	Corning, N. Y. [illegible]h 13, 1944	T. 14348
	1915-1919		Corning, N. Y.	
	1933-1944	Callahan	March 13, 1944	84
	Before 1919	Richter	Corning, N. Y. March 13, 1944	92
	For years before 1919	Farrell	Corning, N. Y. March 13, 1944	T. 14368
	1909-1919	Gaiss	Corning, N. Y. March 13, 1944	T. 14375
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Place	Date	Witness	Place and Date of Deposition	Page of Deposition
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	1908-1918	Bennett	Corning, N. Y. March 14, 1944	T. 14412
	1915-1918	Edmister	Penn Yan, N. Y. March 14, 1944	T. 14437
	1912-1919	B. F. Johnson	Williamsport, Pa. Dec. 7, 1944	T. 14900
	1908-1919	H. Miller	Rochester, N. Y. Oct. 29, 1946	89
Cuba	Before 1919	J. T. Robinson	Cuba, N. Y. March 15, 1944	T. 14461
	Before 1919	Stambaugh	Olean, N. Y. March 16, 1944	T. 14485
Hammondsport	1910-1916	Hoyt	Hammondsport, N. Y. March 14, 1944	T. 14433
	1912-1919	H. Miller	Rochester, N. Y. Oct. 29, 1946	89

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Jamestown	1909-1919			
	Since repeal	Thayer	Jamestown, N. Y. Jan. 17, 1947	T. 16769
	1910-1918	Jeffreys	Jamestown, N. Y. Jan. 17, 1947	T. 16790
Keuka	1910-1916	Hoyt	Hammondsport, N.Y. March 14, 1944	T. 14433
Lakewood	1933 to date	Thayer	Jamestown, N. Y. Jan. 17, 1947	T. 16769
Lockport	1917-1919		Lockport, N. Y.	
	1943-1945	E. J. Murphy	Dec. 12, 1945	T. 15591
Medina	1911-1915	E. J. Murphy	Lockport, N. Y. Dec. 12, 1945	T. 15591
Newark (N.Y.)	1905-1918	Wilbur	Sodus Point, N. Y. Aug. 13, 1942	31
	1907-1918	W. Parker	Newark, N. Y. Aug. 13, 1942	T. 13787

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	1906-1917	A. Parker	Newark, N. Y. Aug. 13, 1942	T. 13795
	1909-1913	Doame	Newark, N. Y. Aug. 13, 1942	T. 13801
	1905-1917	Dunlap	Newark, N. Y. Aug. 13, 1942	T. 13808
	1911-1917	Allen	Newark, N. Y. Aug. 13, 1942	T. 13816
	1907-1911	Gardenier	Newark, N. Y. Aug. 13, 1942	T. 13825
New York City	1910-1914	Lindenberg	New York, N. Y. Dec. 17, 1946	3
	Before 1919	Hertzogg	Newark, N. J. Dec. 19, 1946	6
	1910-1915	Rowe	Newark, N. J. Dec. 19, 1946	T. 16714
Niagara Falls	1914-1919	Richards	Niagara Falls, N. Y. Dec. 10, 1945	T. 15467

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
	1911-1914	Cudahy	Niagara Falls, N. Y. Dec. 10, 1945	T. 15498
	1907-1919	Gray	Niagara Falls, N. Y. Dec. 11, 1945	T. 15554
	1915-1919	Bald	Niagara Falls, N. Y. Dec. 11, 1945	T. 15541
	1911-1919	McRoy	Walmore, N. Y. Dec. 11, 1945	T. 15517
	1912-1920	W.H.MacDonald	Niagara Falls, N. Y. Dec. 12, 1945	T. 15573
N. Tonawanda	1942-1944	C. J. Brick	Buffalo, N. Y. July 18, 1946	T. 15909
	1941-1943	R. C. Brick	Buffalo, N. Y. July 20, 1946	T. 16129
Olean	Before 1919	Brazel	Olean, N. Y. March 15, 1944	201
	1906-1919	Cook	Olean, N. Y. March 15, 1944	T. 14465

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
	1933	Klink	Olean, N. Y. March 16, 1944	T. 14481
	Before 1919	Stambaugh	Olean, N. Y. March 16, 1944	T. 14485
	1933	Phelan	Buffalo, N. Y. July 18, 1946	T. 15953
Oswego	1909-1918	Carey	Oswego, N. Y. Aug. 13, 1942	T. 13771
Rochester	1940	Bechler	Rochester, N. Y. Oct. 28, 1946	29
	1940	Poze	Rochester, N. Y. Oct. 28, 1946	63
	1915-1919	H. Miller	Rochester, N. Y. Oct. 29, 1946	89
	1915-1919 1940	F. N. Smith	Rochester, N. Y. Oct. 30, 1946	108

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	1912-1919		Salamanca, N. Y.	
	1933-1946	Chamberlain	Oct. 31, 1946	176
	1912-1918	Stephens	Salamanca, N. Y. Oct. 31, 1946	197
	1913-1918	E. M. Conners	Salamanca, N. Y. Oct. 31, 1946	213
	1906-1907			
	1914-1918		Salamanca, N. Y.	
	1933-1946	Wilson	Oct. 31, 1946	225
	1913-1918	Meissner	Salamanca, N. Y. Oct. 31, 1946	248
	1909-1919	Thayer	Jamestown, N. Y. Jan. 17, 1947	T. 16769
Generally in Western N. Y.	1906-1918	Carlson	Jamestown, N. Y. Jan. 17, 1947	T. 16745

New Jersey

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East Orange	1906-1919	Herder	Newark, N. J. Aug. 29, 1942	T. 13906
Throughout Hudson County	1911-1920	McGrath	Newark, N. J. Sept. 1, 1942	T. 14023
Jersey City	1911-1919	C. A. Winter	Newark, N. J. Sept. 1, 1942	T. 14058
	1910-1919	Brady	New York, N. Y. Sept. 3, 1942	T. 14153
Newark (N.J.)	1907-1910	Voight	Newark, N. J. Aug. 28, 1942	T. 13851
	1910-1920	Minehan	Newark, N. J. Aug. 28, 1942	T. 13876
	1908-1919	McDonough	Newark, N. J. Aug. 28, 1942	T. 13882
	1907-1917	Doolin	Newark, N. J. Aug. 29, 1942	T. 13918

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	1910-1919	Wendel	Newark, N. J. Aug. 31, 1942	T. 13957
	1911	H. A. Winter	Newark, N. J. Aug. 31. 1942	177
	1913-1918	Zbikowski	Newark, N. J. Aug. 31, 1942	T. 13976
	1913-1917	Friedrich	Newark, N. J. Aug. 31, 1942	T. 13982
	1911-1918	F. Throm	Newark, N. J. Aug. 31, 1942	T. 13997
	1907-1914	E. H. Throm	New Haven, Conn. Aug. 10, 1942	99
	1913	Jameson	New Haven, Conn. Aug. 10, 1942	T. 13720
	1907-1918	C. Throm	Newark, N. J. Aug. 31, 1942	T. 14010

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	1910-1912	Scheid	Newark, N. J. Sept. 1, 1942	241
	1911-1920	McGrath	Newark, N. J. Sept. 1, 1942	T. 14023
	1914-1918	O'Connor	Newark, N. J. Sept. 1, 1942	T. 14036
	1913-1915	Wiedman	Newark, N. J. Sept. 1, 1942	T. 14043
	1910 & later	Fulks	Newark, N. J. Sept. 1, 1942	T. 14050
	1910-1915	Welch	Newark, N. J. Sept. 1, 1942	T. 14054
	1911-1919	C. A. Winter	Newark, N. J. Sept. 1, 1942	T. 14023
	1907-1919	Vogel, Sr.	Newark, N. J. Sept. 2, 1942	T. 14075
	1907-1912	F. Wodey	Newark, N. J. Sept. 2, 1942	T. 14100

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
	Before 1919	A. Wodey	Newark, N. J. Sept. 2, 1942	T. 14124
	1906-1918	Coates	Newark, N. J. Sept. 2, 1942	T. 14128
	1907-1918	Seib	Newark, N. J. Sept. 2, 1942	T. 14016
	1913-1918	Dohrn	Newark, N. J. Sept. 2, 1942	385
	1907-1919	Wurster	New York, N. Y. Sept. 3, 1942	445
	1907-1918	Buehler	Newark, N. J. Dec. 19, 1946	75
	Before 1919	Carlson	Jamestown, N. Y. Jan. 17, 1947	T. 16745
Orange	1911-1919	C. A. Winter	Newark, N. J. Sept. 1, 1942	T. 14023
	1910-1920	Minehan	Newark, N. J. Aug. 28, 1942	T. 13876

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
	1911	H. A. Winter	Newark, N. J. Aug. 31, 1942	177
Trenton	1914-1919	Weinman	Newark, N. J. Dec. 19, 1946	25
Throughout New Jersey	1905-1919	Binder	Renovo, Pa. July 9, 1945	3
		Connecticut		
Bridgeport	1912-1919	Harter	Bridgeport, Conn. Aug. 10, 1942	3
	1912-1919	Jameson	New Haven, Conn. Aug. 10, 1942	T. 13720
	1915-1917	Welch	Newark, N. J. Sept. 1, 1942	T. 14054
	Before 1919	Buehler	Newark, N. J. Dec. 19, 1946	75
	1907-1918	Quint	New Haven, Conn. May 1, 1945	T. 15181

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Bristol	1907-1918	Quint	New Haven, Conn. May 1, 1945	T. 15181
Hartford	1907-1918	Quint	New Haven, Conn. May 1, 1945	T. 15181
Middletown	1907-1918	Quint	New Haven, Conn. May 1, 1945	T. 15181
New Haven	1908-1914	C. Throm	Newark, N. J. Aug. 31, 1942	T. 14010
	1907-1913	E. Throm	New Haven, Conn. Aug. 10, 1942	T. 13744
	1909-1914	E. H. Throm	New Haven, Conn. Aug. 10, 1942	99
	1915-1917	Welch	Newark, N. J. Sept. 1, 1942	T. 14054
	1907-1918	Quint	New Haven, Conn. May 1, 1945	T. 15181
New London	1913-1917	Hahn	New London, Conn. May 1, 1945	T. 15168

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
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Saybrook	1907-1918	Quint	New Haven, Conn. May 1, 1945	T. 15181
South Norwalk	1912-1919	Harter	Bridgeport, Conn. Aug. 10, 1942	3
Stamford	1912-1919	Harter	Bridgeport, Conn. Aug. 10, 1942	3
	1907-1918	Quint	New Haven, Conn. May 1, 1945	T. 15181
Stratford	1912-1919	Harter	Bridgeport, Conn. Aug. 10, 1942	3
	1915-1917	Welch	Newark, N. J. Sept. 1, 1942	T. 14054
Westbrook	1907-1918	Quint	New Haven, Conn. May 1, 1945	T. 15181
Westport	1912-1919	Harter	Bridgeport, Conn. Aug. 10, 1942	3

Place	Date	Witness	Place and Date of Deposition	Page of Deposition
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		Massachusetts		
Adams	Before 1912	Driscoll	Pittsfield, Mass. Aug. 12, 1942	T. 13760
	1910-1917	Morey	Pittsfield, Mass. Aug. 12, 1942	T. 13748
Throughout Bristol County	1909-1917	Scheminger, Jr.	Providence, R. I. April 30, 1945	56
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Huntington	Before 1910-1917	Morey	Pittsfield, Mass. Aug. 12, 1942	T. 13748

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Throughout Rhode Island	1909-1917	Scheminger, Jr.	Providence, R. I. April 30, 1945	56

Ohio

Ashtabula	1916-1918	Ziegler	Ashtabula, Ohio Nov. 18, 1946	T. 16447
	1907-1917	Ferraro	Ashtabula, Ohio Nov. 18, 1946	T. 16467
	1910-1918	McCluskey	Ashtabula, Ohio Nov. 19, 1946	T. 16504

2. TESTIMONY AT TRIAL

Place	Date	Witness	Testimony Reference *
		Pennsylvania	
Butler	Since Repeal	Deahl	R. 673a
	1937-1946	Kulick	R. 677a
	1937-1946	Straub	R. 680a
Clarion	1910-1919		R. 628a
	1933-1947	Perry	R. 625a
	1909-1947	Trunk	R. 630a
Du Bois	1914-1947	Roeny	R. 725a
Indiana	1913-1947	Brown	R. 707a
	1939-1947	Bence	R. 711a-R. 712a
Kittanning	1933-1947	Ellermeyer	R. 737a
Meadville	1935-1947	Dixon	R. 727a
	1937-1944	Bellows	R. 730a-R. 731a

* These page references identify pages of the printed appendix to appellant's brief in the Court of Appeals, on the first of the two appeals to that court.

Place	Date	Witness	Testimony Reference
Oil City	1933-1947	Veloudis	R. 556a
	1933-1947	Hanes	R. 559a
	1933-1947	Stubler	R. 561a
Punxsutawney	Since Repeal	Olson	R. 718a
	1940-1947	Roeny	R. 723a
Rossiter	1908—few years later	Olson	R. 716a, R. 717a
Sharon	1933-1947	Cardella	R. 635a
	1937-1947	Masters	R. 637a, R. 638a
	1933-1947	Braymaker	R. 641a
Somerset	1933-1946	Bowlby	R. 714a, R. 715a
		Ohio	
Youngstown	1933-1947	Dixon	R. 617a-R. 619a

FILED
FEB 27 1952
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1951

No. 502

ANHEUSER-BUSCH, INCORPORATED,
Petitioner,

against

DU BOIS BREWING COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF

WALLACE H. MARTIN,
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Supreme Court of the United States

OCTOBER TERM, 1951

No. 502

ANHEUSER-BUSCH, INCORPORATED,
Petitioner,

against

DU BOIS BREWING COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF

I

Contrary to respondent's argument in Point I this Court's denial of the earlier petition is not here controlling.

While it is true that one of the several questions raised in the earlier petition for a writ of certiorari (No. 495, October Term 1949) was whether the Court of Appeals' first decision was a departure from the usual and accepted course of judicial procedure, nevertheless if the denial of the petition involved that question at all, it can be explained because the question was then premature.

The Court of Appeals' first opinion was not definite and specific, and at the time of the earlier petition it had not been judicially construed. This Court, in denying the earlier petition, gave the lower courts the opportunity to construe the first opinion of the Court of Appeals as requiring the complete determination of the controversy

instead of as promoting a multiplicity of future actions. This the courts below refused to do.

The courts below, however, have now construed the first opinion of the Court of Appeals [1] to require that the stated cause of action as to threatened expansion and the issues as to the boundaries of respondent's "localized territory" be left undetermined on the theory that such issues should be taken care of in future litigation.[2] This construction of the opinion and mandate of the Court of Appeals embodied in the judgment after mandate, which the Court of Appeals has affirmed, we submit was erroneous and now presents to this Court for the first time a question involving a clear departure from the accepted and usual course of judicial procedure. This is true in law and as a practical matter regardless of whether the error below lies in the first opinion of the Court of Appeals or in the construction of it given by the District Court and affirmed by the Court of Appeals. Respondent's brief (pp. 35-36) attempts to gloss over the principle of public policy that issues in a case should be definitely decided and not left open for relitigation. Public policy requires the fulfillment of the fundamental duties of the courts to decide litigated issues and to avoid a multiplicity of suits where one will suffice. Such is the procedure required by the rules and which this Court should enforce.

Respondent urges that because of the previous denial of certiorari this Court now consider itself bound, under the doctrine of "the law of the case", by the decision below.

It is familiar law that on certiorari the entire case is before this Court which is neither limited as to the issues [3]

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[1] This construction is shown by the judgment after mandate (R. 103a) which was approved by the Court of Appeals.

[2] The District Court after mandate recognized that the parties would "have a lot more litigation" (R. 211a). "Some other Court is going to have to deal with this" (R. 231a). See also: R. 247a, 248a.

[3] *Panama Railroad* v. *Napier Shipping Co.*, 166 U. S. 280, 284 (1897).

nor bound by what the Court below may have held to be the law of the case.[4] In *U. S.* v. *Kreider*[5] a ruling which the Third Circuit Court of Appeals had declared to be the law of the case was held to be erroneous, and on this very issue the judgment was reversed. Respondent, in its discussion of the doctrine of the law of the case, cites the decision of the Court of Appeals in the *Kreider* case (Resp. Br. p. 33), but fails to note its reversal.

The doctrine of "the law of the case" concerns "the effect of previous orders on the later action of the Court rendering them in the same case".[6] In *Insurance Group Committee* v. *Denver & R. G. W. R. Co.*,[7] on which respondent relies (Resp. Br. p. 35), there had been a previous decision by this Court, made after it had granted a previous petition for certiorari. The contention that a denial of a previous petition for certiorari can have the same effect was disposed of in *Hamilton-Brown Shoe Co.* v. *Wolf Brothers*,[8] as based upon an erroneous view of this Court's jurisdiction to review by certiorari. In that case the decree previously sought to be reviewed by certiorari had not been a final one,

> "a fact that of itself alone furnished sufficient ground for the denial of the application; * * *. It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the inter-

[4] *Messenger* v. *Anderson*, 225 U. S. 436, 444 (1912).

[5] 313 U. S. 443 (1941).

[6] *Messenger* v. *Anderson*, supra, quoted in respondent's brief at p. 32. There is no controversy here over the law of the case as binding on a lower Court or as a rule of practice governing the decisions of the Court of Appeals with respect to matters previously decided by the Court of Appeals. This is the subject discussed in respondent's brief, pp. 32-33.

[7] 329 U. S. 607 (1947).

[8] 240 U. S. 251, 258 (1916).

> locutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for the guidance of the referee, the District Court, and the Court of Appeals itself upon the second appeal, this Court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings."

Similarly, in *U. S.* v. *U. S. Smelting Co.*,[9] this Court held the doctrine of the law of the case to be inapplicable "because when the case was first remanded, nothing was finally decided * * * when finally decided, all questions were still open and could be presented."

In a comparable proceeding this Court, in an early decision, made it clear that matters brought prematurely to its attention, or for other reasons denied its consideration, may be presented to it again at a later stage of the litigation. In *Ward* v. *Chamberlain*,[10] which came up on a certificate of division, certain questions were held premature and this Court held that they should "remain in the Court below to be determined by the Circuit Judges" adding, however, that undoubtedly they might be brought to it "for revision by another certificate of division in an opinion like the present, or by an appeal after final judgment * * *."

These statements are applicable to the proceedings in the present case.

Respondent cites no instance where this Court has denied a writ of certiorari on the ground that it had denied a previous petition presenting similar questions. We know of no such instance among the cases where the Court has stated its reasons for rejecting petitions. We believe that this Court's willingness to consider and decide a case which involves a question affecting the public interest and private justice will not be foreclosed by any arbitrary rule such as is urged by respondent.

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[9] 339 U. S. 186, 198 (1950).

[10] 67 U. S. (2 Black) 430, 435 (1862).

The accepted and usual course of judicial proceedings which petitioner seeks to have enforced by this Court is the entry of a judgment which will finally dispose of the cause of action alleged in the complaint for threatened expansion of respondent's "localized territory" in which it had an established good will on April 20, 1940, the determination of the geographical definition of such territory and other related issues raised by the pleadings and proofs so that a multiplicity of future actions may be avoided. The question whether or not this procedure should be enforced is the reason why the petition should be granted. This reason is present regardless of whether the same question was involved in an earlier petition or whether the courts below strictly complied with the mandate of the Court of Appeals, but it is particularly applicable now because for the first time this Court is confronted with the definite refusal by the Court of Appeals to dispose of the existing cause of action alleged in the complaint and supported by evidence.

II

Contrary to respondent's argument in Point II petitioner had a valid cause of action which survived the Court of Appeals' decision and which was fully supported by evidence of record, but which the District Court refused to consider.

Respondent's brief erroneously asserts (pp. 22, 23) that respondent's "localized territory" was fixed by respondent's "sales", and that "petitioner's present petition rests, basically, upon the fact that the courts did not * * * fix * * * the area wherein respondent *sold its beer prior to April 20, 1940.*" Later (Resp. Br. p. 36), it states that "petitioner's present arguments all concede" that respondent's "localized territory" was where "DuBois Budweiser Beer * * * " "was known and *offered for sale* on April 20, 1940." It then concludes, page 37, "This unavoidable concession means, how-

ever, that on April 20, 1940, *sales* of the respondent's 'DuBois Budweiser Beer' had given petitioner no right of action whatever and that if, as the courts below have held, the decision of the case must be based on the facts existing on that date, a final judgment dismissing the complaint was inevitable." [11]

The error in respondent's argument is that the Courts below did not refer to respondent's "localized territory" merely as where its beer "was known and offered for sale" or where "sales" of its beer had been made. On the contrary, the Court of Appeals' decision refers to respondent's "localized territory" as being where it "has acquired over the period of years a good will" (R. 81a). The District Court after mandate found the following facts (R. 101a):

> "21. Within its localized areas of distribution defendant assuredly has acquired over the period of years a good will in the name 'DuBois Budweiser'."
>
> "22. On April 20, 1940 defendant had an existing substantial good will in the name 'DuBois Budweiser' in certain areas, localized and defined by prior substantial distribution and sales as distinguished from mere sporadic and occasional distribution and sale of 'DuBois Budweiser' beer in such localized areas."

The Court's finding 22 expressly excluded from respondent's "localized territory" all territory where respondent had a "mere sporadic and occasional distribution and sale of 'DuBois Budweiser'." This finding obviously is correct because good will is not based on any such sales (See Petition, p. 10).

It follows, therefore, that respondent's claim that mere "sales" on April 20, 1940, however inconsequential, had barred petitioner's right of action is without foundation in law. The Court was obligated to determine whether the sales were "substantial" and whether as a result of

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[11] Emphasis supplied.

such sales "on April 20, 1940, defendant (respondent) had an existing substantial good will in the name 'Dubois Budweiser'." Any sales not of this character would be evidence of a threat to extend respondent's territory and would therefore fully support the cause of action alleged in the complaint, of threatened extension of respondent's territory as of April 20, 1940, which cause of action was not disposed of by the Court of Appeals' decision.[12]

Respondent asserts, brief page 37, that "no evidence was offered" to support the allegation in the complaint that respondent had threatened to extend its "localized territory."[13] Respondent's admissions before the District Court, even in the proceedings after mandate, show that at the time of the filing of the complaint (April 20, 1940) and at all times since respondent was threatening and still continues its threat to expand its sales of "DuBois Budweiser" to areas beyond any "localized territory" where it might have an established good will. Respondent there asserted that it can sell its "DuBois Budweiser" beer "anywhere in the

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[12] Respondent's brief asserts (p. 42) that the District Court held that such sales would not correct the defect of failing to allege a cause of action as of April 20, 1940, citing R. 200a. There is no support for this assertion and even if the Court had so held, it would clearly have been error since the complaint alleges threatened expansion. See Petitioner's main brief, p. 19 et seq.

[13] Respondent thus recognizes that a cause of action for threatened expansion remained after the decision of the Court of Appeals, although it attempts to conceal the fact by asserting (Resp. Br. p. 36) that "petitioner had no cause of action at the time it commenced this suit." It concedes that petitioner has a cause of action against respondent's expansion of its territory but claims that such a cause of action should be left to "another action, if respondent shall ever violate the alleged territorial boundaries" (Resp. Br. pp. 31, 45, 46, 48). Respondent's argument admits by implication that the material issues could have been determined by the Court below and further litigation avoided. While respondent's admissions eliminate the necessity for further search of the record as to the basis for and proof of petitioner's cause of action for threatened expansion, the fact is that contrary to respondent's assertions, the evidence of record amply supports petitioner's cause of action for threatened expansion.

world" (R. 182a). This it re-enforced by subsequently agreeing with the comment of the District Judge that it claimed the world, in terms, as respondent's counsel re-asserted it: "We always have, since the case started" (R. 196a). Coming, as they did in the proceedings for entry of judgment after mandate, these admissions and assertions not only preclude any doubt as to respondent's threats, but they also reflect upon respondent's good faith in seeking (Resp. Br. p. 11) to minimize the allegations of the complaint as to respondent's threatened extensions of its territory. However, these allegations in paragraphs 34 and 37 of the complaint (R. 14a) cannot be glossed over as "more or less routine". Respondent's answer denied these allegations (R. 39a).

The evidence of record clearly supports the allegations of threatened expansion (Pet. Main Br. p. 21). Respondent bases its contrary argument upon its erroneous contention that respondent had a good will even in places where its sales were merely sporadic and occasional.[14] See supra, pp. 5-6.

There has been no finding by either the Trial Court or the District Court after mandate, based on evidence as to the territory where respondent had established a good will on April 20, 1940. The Trial Court had no occasion to make any such findings, since it granted an unrestricted injunction,[15] and the District Court after mandate refused

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[14] Respondent's brief (pp. 38-41) asserts claims wholly unsupported by the evidence. It relies upon sporadic and occasional sales as distinguished from proof of established good will. Furthermore, its inference (Br. p. 40) of "carefully planned" testimony is untrue and wholly unsupported by any evidence whatever.

[15] Respondent gives special emphasis to its assertion (Resp. Br., p. 15) that "No question of localized territory was raised or suggested by either party" on the first appeal to the Court of Appeals. The fact is that respondent at the trial attempted to prove the extent of its localized territory in support of its defense of estoppel. Of course, until the Court of Appeals based its decision on a limited estoppel in respondent's "localized territory", petitioner did not discuss the question.

to define the territory geographically and even to consider supporting evidence as shown by Conclusion of Law after Mandate No. 4 (R. 102a).

Respondent's brief is silent on the main issue, affecting both the rights of petitioner and the public interest, namely, the failure of the court below to determine issues whose adjudication would conclude the controversy and prevent a multiplicity of actions. We submit the courts below should now be required to consider the evidence, settle the dispute between the parties as to the significance of the evidence and make appropriate findings and conclusions.

Furthermore, wholly apart from the question of petitioner's cause of action for acts committed, or threatened to be committed, by respondent outside its "localized territory", it was a departure from the accepted and usual course of judicial proceedings to hold on the material issue of estoppel that it was sustainable in part but that its limits may be left vague and undetermined.[16] For a court, under the circumstances of this practical business dispute to purport to decide a case by saying that respondent's "squatter" rights arising out of estoppel are limited and then refuse to define what the limits are renders its decision meaningless.

No one questions the soundness of the principle that there must be an end to litigation (Resp. Br. p. 34). The fallacy of respondent's argument lies in doing lip service to that principle by urging the termination of the present suit upon a partial determination of its issues and excising other litigated but undecided vital issues and perpetuating them for relitigation in future actions made necessary only by the Court's failure adequately to dispose of the pending case.

There is an additional reason why the present petition should be granted. The trial Court found confusion and

[16] See question (c), Petition, p. 5 and Petitioner's main brief, pp. 12-13 under sub-point 2.

deception of the public. For example, Finding 41 of the trial Judge (R. 64a) reads:

> "41. Members of the public, who for many years had believed the word 'Budweiser' was a brand name for a beer put out by Anheuser-Busch, ordered 'Budweiser' beer on draught and received beer from a tap on the handle of which were the words 'DuBois Budweiser' which beer they believed to be plaintiff's."

While the Court of Appeals reversed the judgment after trial, the reversal was based upon a limited estoppel applicable only to defendant's "localized territory" where it had an established good will. The Court of Appeals recognized that the estoppel was not applicable beyond that territory. It said (R. 85a):

> "By the same token, DuBois, having confined the sale of its DuBois Budweiser product to localized territory, should not expect to extend its use of that name to other areas with legal impunity."

The complaint alleges threatened expansion, and the evidence of record shows expansion. The Findings of Fact of the Trial Court show that in such territories confusion and deception of the public have and will continue to result. The courts below already have permitted this deception and confusion to continue too long, and we submit that it is the duty of this Court now to protect the public as well as petitioner by requiring that this confusion and deception be brought to an end.[17]

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[17] *Coca-Cola Co.* v. *Koke Co.*, 254 U. S. 143, 145 (1920); *Florence Mfg. Co.* v. *Dowd*, 178 Fed. 73, 75 (C. C. A. 2, 1910); *Rosenberg Bros. & Co.* v. *Elliott*, 7 F. 2d 962, 965 (C. C. A. 3, 1925); *Esso, Inc.* v. *Standard Oil Co.*, 98 F. 2d 1, 5 (C. C. A. 8, 1938); *R. H. Macy & Co.* v. *Macys Inc.*, 39 F. 2d 186, 187 (N. D. Okla., 1930); *Coca-Cola Co.* v. *Busch*, 44 F. Supp. 405, 407 (E. D. Pa., 1942); *Consolidated Home Specialties Co.* v. *Plotkin*, 358 Pa. 14, 55 A. (2d) 404, 412 (S. Ct. Pa., 1947); *Thompson-Porcelite Co.* v. *Harad*, 356 Pa. 121, 51 A. (2d) 605, 607 (S. Ct. Pa., 1947).

III

Respondent's brief contains additional serious misstatements of law and fact.

Respondent's brief stresses the false premise contained in the frequently repeated erroneous assertion that the Court of Appeals "directed a judgment dismissing the case" (Resp. Br. p. 2); proposed to issue a mandate which would "call for an unqualified dismissal of the complaint" (Resp. Br. p. 24); and that it was apparent even from the first decision of the court below that what was contemplated was only that the suit should be dismissed and that no further consideration should be given to the matter of "localized territory" (Resp. Br. p. 25). Neither the opinion (R. 72a), judgment (R. 89a) nor mandate (R. 90a) contains any direction that the complaint be dismissed.

What the Court of Appeals did was to find against petitioner a partial estoppel, which was undefined geographically but stated to be restricted to localized territory where respondent had an established good will on April 20, 1940. Therefore it "reversed" (R. 85a, 89a, 90a) the decree of the Trial Court (R. 71a) which had granted an absolute injunction against respondent's use of "Budweiser".

Throughout the trial and before the Court of Appeals respondent urged that "Budweiser" described a type of beer, this being its most nearly plausible excuse for using the name. Both the Trial Court (R. 61a) and the Court of Appeals (R. 76a) rejected this contention. Respondent's brief (p. 6) still erroneously asserts, without citation of authority, that "Budweiser" prior to 1876 had been the common name applied to beer made according to a recipe or process originated in Budweis. The Court of Appeals expressly contradicted this stating, "The record does not sustain the DuBois contention that 'Budweiser' in either common parlance or even brewing circles was denominative of a beer which can be prepared and aged only with specific ingredients and according to an undeviable for-

mula" (R. 76a). On the contrary, the Court of Appeals observed that the "Dundee" rationale [18] (as to secondary meaning trade-mark rights) is that which would apply to this record, and assumed arguendo that the word "Budweiser" had acquired a secondary meaning identifying petitioner (R. 76a).

Contrary to respondent's assertion in its brief (p. 6), the importations of foreign beer from Bohemia were never substantial. The record shows insignificant sales in a few scattered cities in five Atlantic seaboard states, and contrary to respondent's statement in its brief (p. 9), the Patent Office proceedings between petitioner's predecessor and the foreign brewers did not terminate with territorially limited licenses to petitioner's predecessor, but ended by the foreign brewers conceding the priority of petitioner's predecessors in the use of "Budweiser" as a trade-mark for beer (Ex. 101-F, 101-G). Furthermore, respondent can gain no right from the fact that at one time the brewers of beer from Budweis, Bohemia, were entitled to use the term "Budweiser", in the sense of the Germanic form of the word "Budweis" meaning "of or from Budweis", to indicate the geographic origin of their beer. Respondent has always brewed its beer at DuBois, Pennsylvania, not Budweis, and therefore, has never made a geographically descriptive use of the term "Budweiser", nor is there any support for respondent's argumentative conclusions in its brief (p. 7) that respondent's former president "was undoubtedly familiar" with European beers and brewing methods.

Respondent's brief (pp. 9, 10) seeks to convey an erroneous impression with respect to the termination of the 1908 suit by asserting that "petitioner voluntarily discontinued its suit", and referring to "respondent's success—by default" without disclosing the fact that the 1908 suit was discontinued upon respondent's consent (Ex. 13) and under the law such discontinuance was without prejudice, placing an equal burden upon respondent.

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[18] Citing *Hartman* v. *Cohn*, 350 Pa. 41, 38 A. 2d 22 (1944).

Respondent's brief (p. 10) erroneously asserts that during the period between 1908 and 1940 its "DuBois Budweiser" beer became known in a substantial part of the east. While the record shows some intermittent sales of "DuBois Budweiser" beer in a few towns in Massachusetts, Rhode Island and Connecticut, and Newark, New Jersey prior to prohibition, the fact is that at the time the complaint was filed, respondent had made no sales in such areas for over 20 years, nor had it done so up to the time of the trial which brought the gap in its sales to almost thirty years and obliterated any possibility of any previously existing good will remaining to respondent in such territory. Even in Pennsylvania its intermittent distribution has never covered almost the whole of the state, as respondent asserts, but has been restricted primarily within a short radius surrounding its brewery. In New York, Ohio and West Virignia respondent's sales have never covered large sections of the states but have been restricted to discontinuous and sporadic incursions in a few cities.

Respondent in its brief (pp. 10-11) seeks to give the impression that the extent of its sales territories was not in issue or was not litigated. Nothing could be further from the facts as pointed out in petitioner's main brief (p. 8 et seq.). The issues of estoppel and of respondent's territorial rights were clearly raised by the pleadings and even respondent's answer (R. 41a) admits in its Fourth Defense a territorial limitation, the extent of which as alleged however, petitioner does not concede. Respondent had the burden of proving the scope of its estoppel, viz. the extent of its territory. Even if it were true, as respondent asserts, that it made no effort to prove its extent, that was respondent's fault. Respondent had no right to assume that the trial Court would decide the case on another issue and withhold any evidence it might have; and at the trial, as it was bound to do in order to show the extent of an estoppel based on laches, respondent offered testimony as to the extent of its sales.

Respondent seeks to convey the impression that the testimony as to territory was supplied merely to comply with demands made by petitioner.[19] The depositions taken by respondent and respondent's exhibits (R. 252a-283a) and testimony showing the territorial extent or respondent's sales were put in evidence at the trial by respondent and not by petitioner. Further, respondent's territorial claims are included as a part of its brief (pp. 1c-43c), and this compilation shows the evidence upon which respondent relies to establish its defense of estoppel, and therefore demonstrates the limitations of its "localized territory". It also includes admissions by respondent of places where respondent subsequent to the filing of the complaint on April 20, 1940, made sales of "DuBois Budweiser" beer beyond its "localized territory."

Respondent's reference in its brief (p. 11) to an interlocutory ruling of Judge Schoonmaker,[20] constitutes mere subterfuge because respondent did not rely upon that ruling but took depositions of witnesses over a substantial area and introduced additional testimony by witnesses at the trial in an endeavor to show where its beer had been sold. From what occurred at the trial (R. pp. 110a-114a), it is clear that respondent was given full opportunity to prove the territorial extent of its sales and that respondent was fully aware that the trial Court was receiving the evidence for that purpose. When petitioner

[19] While it is true that petitioner, in advance of the trial, desired information as to the extent of respondent's sales, petitioner did not need this to prove infringing sales because respondent's answer admitted the making of sales under the name "DuBois Budweiser" (R. 41a). Petitioner desired this information before the trial in order to know in advance what proof it would have to meet with respect to the territorial extent of respondent's sales and also to enable petitioner to produce, as it did, testimony for those territories showing that the name "Budweiser" there, as elsewhere throughout the United States, identified petitioner, and that respondent's use of "DuBois Budweiser" caused confusion.

[20] *Anheuser Busch, Inc.* v. *DuBois Brewing Co.*, 3 F. R. D. 336 (W. D. Pa., 1943).

objected to such testimony of respondent, the trial Court said, "I never heard of this decision of Judge Schoonmaker's, so that I opened the door for you; and having opened the door for you, I can't close it for him" (R. 111a).

Upon further argument with respect to respondent's introduction of evidence showing the territorial extent of respondent's sales of "DuBois Budweiser", the trial Court said in admitting the testimony, "Yes, they want to show the extent" (R. 114a).

Respondent's brief (p. 11) erroneously states that the three more definite statements of the complaint are of no value with regard to the allegations of the complaint covering respondent's threats to expand. The proper relationship of these further statements to the complaint is explained in petitioner's main brief (p. 22 footnote 26a). The effect of these further statements was to show the accomplishment of respondent's threats and it matters not that such demonstration was made while answering respondent's demands for particulars as to other paragraphs of the complaint. Respondent has not answered petitioner's brief but merely denies the relationship between the pleadings (Resp. Br. p. 11). This is all that respondent has to offer in support of the decision of the Court below ignoring the later pleadings, filed up to March 10, 1947 (R. 43a).

The contention in respondent's brief (p. 37) that "if, as the courts below have held (R. 102a, 85a), the decision of the case must be based on the facts existing on that date [April 20, 1940], a final judgment dismissing the complaint was inevitable" [21] rests on a ruling for which respondent offers no precedent or support other than the decisions of the Courts below in the present case, and which peti-

[21] The Court of Appeals did not state the law on this question. Page 85a of the record, cited by respondent, contains a part of the opinion of the Court of Appeals on the first appeal. That opinion contains no such ruling. The Court of Appeals however did affirm the decision of the District Court, including the conclusion of law to which respondent refers (R. 102a).

tioner has shown to be an error of law (Pet. Br. p 22). Respondent does not dispute the authorities cited in petitioner's brief (p. 22) for the rule that in equity where, as here, the complaint states a cause of action, the time of the decree, not of the filing of the complaint, governs the court in rendering its decree. Respondent cites no authorities for the contrary decision by the Courts below; so far as respondent's argument depends upon this error of law it must fall.

The question before this Court, however, is not whether the facts as to respondent's extension of its territory were sufficiently proved but whether the Court below departed from the accepted and usual course of judicial procedure in refusing to consider such facts. We submit that these facts should have been considered and not only as of April 20, 1940 but also as of the date of the judgment after trial.

Respondent's brief (p. 12) makes the unfounded statement that it is "undisputed" that petitioner's decision to start this suit was in no way related to any change in respondent's commercial practices or in the use of the name "DuBois Budweiser". This is tied up with the unwarranted argument in respondent's brief (p. 13) that petitioner "set about procuring evidence" and produced no testimony concerning anything antedating September 27, 1938. These statements are untrue. Some forty witnesses, many of them at the trial, testified to misrepresentations made by respondent's officials and representatives in a fraudulent sales campaign beginning about 1935 or 1936 and continuing even after the complaint was filed.[22] An additional forty-five witnesses testified at the trial and by deposition as to confusion resulting from respondent's misrepresentations in its sales campaign in connection with its use of "DuBois Budweiser". In addition, extensive testimony was offered at the trial and by deposition covering passing off by numerous wholesalers and retailers of respondent.

[22] The details as to respondent's misrepresentations are appended to the earlier petition for certiorari. These the Court of Appeals erroneously held to be "puffing."

Further, the record shows testimony of reports to petitioner of respondent's threats to expand beyond any area within which it had an established good will in 1937 (T. 13139-40) and testimony regarding respondent's misrepresentations to the trade and reported to petitioner during the same year (T. 12388-90, 95). These are the uncontroverted facts which demonstrate the errors in respondent's assertions and the irrelevance of the fictitious date, September 27, 1938.

Respondent devotes six to seven pages (Resp. Br. pp. 6-10, 12-14) to a smokescreen discussion regarding the Bohemian brewers. The apparent purpose of this discussion is an attempt to attack the holding of both Courts below that "Budwieser" never has been the name of a type of beer.

Respondent's counter-statement of the case misrepresents both the complaint and the judgment of the Trial Court, as being concerned with the infringement of a trade-mark, *per se*, and nothing more (Resp. Br. pp. 4, 14), whereas the complaint alleged, in addition to infringement of the trade-mark "Budweiser" *per se*, numerous acts of unfair competition (R. 11a-14a) and prayed for an injunction against the continuation of such acts (R. 15a), and the Trial Court held respondent guilty, not only of trade-mark infringement but also of committing "supervening fraudulent acts" and enjoined respondent, not only from using the words "Budweiser" and "Bud" but also "from otherwise competing unfairly" with petitioner (R. 70a, 71a). Infringement of a trade name is *per se* a fraud, but to state, as respondent does, that it was petitioner's contention "that no period of laches, however long, and no resulting change of position on the part of the alleged infringer, can protect such an infringement from injunctive relief" (Resp. Br. p. 14), and that this contention was sustained by the Trial Court is a misrepresentation of the decision after trial. The Trial Judge held that "injunctive relief is required by the finding of unfair competition on the part of defendant", and that "*In the face of such a*

finding, delay as in suit does not prevent injunctive relief".[23] The conclusions of law after trial include the following: "Defendant's fraud, in continuing its infringement of plaintiff's rights after prompt notice *and the supervening fraudulent acts committed by defendant* [24] bar defendant from claiming laches" (R. 70a).

This misrepresentation of the judgment after trial might not be significant at the present stage of the proceedings if it were not calculated to conceal the issues decided by the Trial Judge which the Court below in affirming the decree of dismissal without more, set aside, without consideration or decision.

Respondent's brief (p. 18) states that petitioner's motion papers in the District Court in connection with petitioner's request for delimitation of defendant's localized territory "did not offer the District Court any description * * * of the 'localized territory'." The fact is that petitioner submitted to the District Court after mandate a proposed finding of fact delimiting defendant's "localized territory" by counties.[25]

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[23] R. 55a, citing *Menendez* v. *Holt*, 128 U. S. 514 (1888); *Juan F. Portuondo Cigar Mfg. Co.* v. *Vincente Portuondo Mfg. Co.*, 222 Pa. 116 (1908); and *Grove Laboratories, Inc.* v. *Brewer & Co.*, 103 F. 2d 175 (C. C. A. 1, 1939). Emphasis supplied.

[24] Emphasis supplied.

[25] Proposed Finding of Fact No. 2 was submitted and explained to the Court on October 6, 1950 (R. 197a, 198a). The Court refused to consider the proposed finding, stating that it was not going to accept the burden of fixing defendant's (respondent's) territory (R. 203a-207a), and the Clerk returned the findings to petitioner. The proposed Finding No. 2 is as follows:

> "2. Defendant's localized territory as of April 20, 1940 is as follows: In Pennsylvania, the Counties of Bradford, Lycoming, Northumberland, Dauphin, York, and all counties to the west of the counties named; in New York, the Counties of Chautauqua, Cattaraugus, Allegany, Wyoming, Erie, Niagara and Monroe; in Ohio, the Counties of Trumbull, Mahoning and Columbiana; and in West Virginia, the Counties of Brooke, Ohio, Marshall, Wetzel, Marion, Tyler and Lewis."

Respondent's brief (p. 20) states that the Findings of Fact and Conclusions After Mandate are largely those submitted by the petitioner. The fact is that after the District Court had turned down petitioner's proposed findings and conclusions, both petitioner and respondent handed up to the Court drafts of findings and conclusions, which in each case were merely counsels' understanding of the Court's direction as to what should be included in the findings and conclusions (R. 208a, 211a, 241a, 251a).

Respondent's above mentioned erroneous statements that petitioner had not offered the District Court any description of defendant's localized territory and that the Findings of Fact and Conclusions After Mandate are largely those submitted by the petitioner are calculated to create the erroneous impression that petitioner was responsible for the failure of the District Court to settle the territorial issue and for the consequent inconclusive character of the judgment.

Respondent's brief (p. 37) erroneously asserts that no evidence was offered to support petitioner's allegations in the complaint, paragraphs 34 and 37 (R. 14a) of respondent's threatened expansions and extensions of its use of "DuBois Budweiser." In addition to the instances of respondent's threatened and actual extensions to territories where it had no established good will in "DuBois Budweiser" on April 20, 1940, referred to in petitioner's brief (p. 21), there are numerous other examples in the record showing the carrying out of such threatened expansions by respondent.

The compilation of testimony included at the back of respondent's brief admits the extension of sales of "DuBois Budweiser" by respondent into Harrisburg and surrounding counties several months after April 20, 1940. Adams, Cumberland and Dauphin Counties were all entered in 1940 (Resp. Br. pp. 1c, 5c, 6c). Respondent's compilation claims that Harrisburg was entered 1939-1941. Taking respondent at its word, this would indicate that the threatened extension was carried out shortly prior to the filing of the complaint. However, respondent's own witnesses testified

that respondent's beer was first sold in Harrisburg in October or the last part of 1940.[26]

Respondent's claim in its brief (p. 39), that its "DuBois Budweiser" beer had been sold in Philadelphia for many years up to prohibition and that its extension of sales to West Chester was not an entrance into new fields, was clearly disproved by the record. The references cited by respondent in its Table I (p. 12c) do not support respondent's contentions but furnish typical examples of the unreliability of respondent's compilations in Table I. The references to claimed sales of "DuBois Budweiser" at Philadelphia cited by respondent at Table I (p. 12c) establish beyond any doubt that respondent had no existing good will in the Philadelphia market either on April 20, 1940 or prior to prohibition,[27] but nevertheless extended its sales beyond

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[26] R. 128a, 129a. The only mention of the year 1939 was by the Diamond brothers. P. Diamond said "Well, exactly I can't tell you what month or what year * * * it was in '39 or '40" (R. 132a). Similar testimony was given by D. Diamond (Dep. p. 171).

[27] Following are the facts regarding the testimony of the witnesses cited by respondent in its Table I (p. 12c), with respect to Philadelphia:

McKernan appears with the ambiguous notation "Before 1919". The witness testified that he had seen "DuBois Budweiser" on sale in one hotel in Philadelphia (Dep. p. 33). His deposition was taken at Norristown December 6, 1943, and the witness testified that he had not seen a bottle of beer labeled "DuBois Budweiser" since 1917 (Dep. pp. 36-37), and he did not know anything about "DuBois" now (Dep. p. 31).

Crosson, an insurance man, whose deposition was taken at Kane in 1945, did not testify to sales of respondent's beer marked "DuBois Budweiser" beer at Philadelphia during a two-year period "1915-1917" as claimed in respondent's Table I (p. 12c). The witness testified that he was in Philadelphia for a couple of days with a man from DuBois, and had some of respondent's beer in a hotel room "along about '17, along in there, '15 to '17 around in there", but the witness did not know where the beer was bought (Dep. p. 446).

The witness Newell did not testify to sales of respondent's beer marked "DuBois Budweiser" at Philadelphia for the period "1914-1919" as claimed in Table I (p. 12c). On direct, the witness testified that he had sold respondent's products at Pottsville some time between 1909 and 1914 (Dep. pp. 155-156), but admitted on cross-examination that he "could not just remember the dates" (Dep. p.

any localized territory where it had an established good will, to West Chester (R. 139a, 142a) in May or June 1940, shortly after the filing of the complaint.

CONCLUSION

For the reasons stated in the Petition, Brief and this Reply Brief, petitioner requests that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Third Circuit in this action, and that the relief therein requested be granted.

Respectfully submitted,

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168). On direct, the witness identified one of respondent's labels marked "DuBois Budweiser" and testified that he had seen it in Philadelphia (Dep. p. 156), but did not testify that he had ever sold defendant's beer so marked in Philadelphia, and on cross-examination testified that the last time he had seen any label like respondent's "DuBois Budweiser" label, which he had identified, was "about 1914; around there" (Dep. p. 169); and the witness further testified on cross-examination that from 1933 to March 7, 1945, he had not seen any beer on sale in Pottsville marked "DuBois Budweiser" (Dep. p. 170).

The witness Carlson, whose testimony was taken at Jamestown, New York, January 17, 1947, testified that he had seen bottled beer with one of respondent's labels marked "DuBois Budweiser" in one place in Philadelphia. He was not asked when and did not testify to any sales of it.

While respondent took the depositions of numerous witnesses who lived and were regularly employed in Philadelphia in the beer business, none testified to sales of respondent's beer marked "DuBois Budweiser" in that market. It is also worthy of note that petitioner in proving the continuous sale of "Budweiser" beer made by petitioner and its predecessors in the Philadelphia market from 1890 to prohibition, introduced the testimony of numerous witnesses who had been employed by the leading wholesale and retail dealers in Philadelphia including hotels and restaurants, and none had ever seen or heard of respondent's beer marked "DuBois Budweiser" on sale in Philadelphia.